Supreme Court, U.S.
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No. 95-1064

In The

Supreme Court of the United States

October Term, 1995

JOSEPH SERFECZ and FIRST CHICAGO TRUST COMPANY OF ILLINOIS, TRUSTEE OF TRUST NO. 684,

Petitioners,

vs.

JEWEL FOOD STORES, INC. and AMERICAN STORES PROPERTIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID MARX, JR.
Counsel of Record
ANNE PRAMAGGIORE
McDERMOTT, WILL & EMERY
Attorneys for Respondents
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

8228
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals properly held that petitioners, who are owners of a retail shopping center, do not have the requisite direct injury to have standing to assert that respondents monopolized, or conspired with others to monopolize, the retail grocery market in violation of the Sherman Act.

LIST OF PARTIES

1. Jewel Companies, Inc. is the parent of Jewel Food Stores, Inc. American Food and Drug, Inc. is the parent of American Stores Properties, Inc.

2. American Stores Properties, Inc. is the parent of American Stores Properties, Inc.-One and American Stores Properties Financing Company, Inc. Jewel Food Stores, Inc. is the parent of: Jewel Buy-In Corporation; Jewel Tea Co., Inc.; Star Market Liquors, Inc.; MFC Livoria Properties, Inc.; and Jetco Properties, Inc.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit was rendered on September 26, 1995 and reported at 67 F.3d 591. The Memorandum Opinion of the District Court for the Northern District of Illinois was entered on August 30, 1994. Because portions of the Court of Appeals' and District Court's opinions were omitted from the versions that were reprinted in the Appendix to Petitioners' Petition for a Writ of Certiorari, they are reprinted in their entirety in Respondents' Appendix at pp. 1a-25a and 26a-72a, respectively.

STATEMENT OF THE CASE

A. The Parties

Petitioner First Chicago Trust Company of Illinois, as trustee, is the title holder of the property known as the Grove Mall, a retail shopping center in Elk Grove Village, Illinois. (Seventh Circuit Opinion at 1, 3, Respondents' Appendix pp. 1a, 3a). Petitioner Joseph Serfecz is both the beneficial owner of this trust and the owner of the management company which operates Grove Mall. (Petitioners hereinafter will be collectively referred to as "Serfecz".)

Respondent Jewel Food Stores, Inc. operates retail grocery stores and combined Jewel/Osco stores that sell grocery and drugstore items. Respondent American Stores Properties, Inc. is the real estate management and development arm of American Stores Company and its subsidiaries, of which Jewel is one. (District Court Opinion at 2, Respondents' Appendix p. 31a). (Respondents hereinafter will be collectively referred to as "Jewel".)

B. The Jewel Lease

In July 1963, Jewel and Serfecz' predecessor-in-interest entered into a lease for Jewel to rent retail space in Grove Mall. *Jewel Cos., Inc. v. Serfecz*, 220 Ill. App. 3d 543, 544, 581 N.E.2d 186 (1st Dist. 1991). The lease's financial terms are extremely favorable to Jewel — other than as required for a 1971 enlargement of the premises, Jewel's rent has not increased since the lease was executed in 1963. Additionally, Jewel has no obligation to pay any real estate taxes on the property.

Other lease terms afford Jewel flexibility in its use, assignment, or subleasing of the premises. In contrast to the leases of other Grove Mall tenants, Jewel's lease does not require Jewel to continuously operate a retail grocery store in its space. (District Court Opinion at 38-39, Respondents' Appendix pp. 62a-63a). Similarly, if Jewel vacates the premises, it is not required to sublease its space; if Jewel chooses to sublease its space, however, Jewel may sublease it to any entity for any lawful purpose, except for use as a drugstore or a bakery, subject only to the stipulation that the landlord's approval is required if a proposed subtenant would increase the cost of insurance to the landlord.

C. The Relationship Between Jewel and Serfecz

Serfecz was not the owner of the Grove Mall when Jewel entered into its Grove Mall lease in 1963, but purchased the shopping center in 1977. In the transaction, Serfecz voluntarily assumed the Grove Mall's existing mortgages and existing leases with its tenants. (Seventh Circuit Opinion at 2, Respondents' Appendix p. 2a). Over the course of the parties' relationship, however, Serfecz consistently has challenged Jewel's right to the benefit of the lease's terms.

In 1971, exercising an option under its lease, Jewel enlarged its premises. Under the terms of the lease, Jewel was required to pay increased rent but was entitled to recoup a portion of this rent increase to cover the cost of construction. Beginning in 1971, Jewel exercised its right of recoupment. *Serfecz*, 581 N.E.2d at 188.

In September 1987, a dispute arose over the amount Jewel was entitled to recoup. When the parties could not reach agreement, Serfecz served Jewel with a landlord's Ten Day Eviction Notice. To avoid eviction, Jewel returned the disputed "excess recoupment," but filed a declaratory judgment in state court seeking a construction of the recoupment clause in the lease because Jewel believed its interpretation of the contract provision was consistent with the original parties' intent. *Serfecz*, 581 N.E.2d at 188. Although the trial court agreed with Jewel's interpretation of the lease, the Illinois Appellate Court reversed. *Serfecz*, 581 N.E.2d at 190.

While this dispute over the recoupment clause was ongoing, Jewel was approached about the possibility of opening a Jewel/Osco store in a new mall to be built in Elk Grove Village. In addition to offering newer, bigger, and more attractive space, the Elk Crossing Mall permitted Jewel to make a significantly different use of its retail space — to operate a Jewel/Osco facility.[1] In October 1987, Jewel vacated its Grove Mall space and opened its new Jewel/Osco store in Elk Crossing Mall.

Upon opening its store in the Elk Crossing Mall, Jewel began trying to sublease its space in Grove Mall and engaged a

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1. Jewel was barred from opening an Osco in the Grove Mall because Walgreens, another Grove Mall tenant, had the exclusive right to sell prescription drugs there. (District Court Opinion at 29, Respondents' Appendix at 54a).

real estate leasing company to obtain a subtenant. Although the premises were difficult to lease because of its large size, the Grove Mall's age and design, and the relatively short term for which the lease was available, the leasing company made continuous attempts to lease the Grove Mall space. In 1989, Jewel proposed to sublet the space to United Skates, a roller-skating rink operator based in Columbus, Ohio. (Seventh Circuit Opinion at 3, Respondents' Appendix p. 3a). Serfecz objected to the proposed sublessee, however, contending that leasing space to United Skates would increase his insurance costs. Despite Jewel's offer to pay any increased insurance costs that Serfecz might incur by having United Skates as a subtenant, and agreeing to reimburse Serfecz for all costs Serfecz might incur when the sublease expired (for example, removing the fixtures that United Skates would add to the premises), Serfecz rejected both offers and threatened legal action against Jewel to block the proposed sublease.

Then in February 1990, without Jewel's permission, Serfecz entered Jewel's leased premises in Grove Mall and changed the locks to prevent Jewel from subleasing or even entering its premises. (District Court Opinion at 41, Respondents' Appendix p. 65a). In response to this trespass, Jewel sought and obtained a restraining order from the Circuit Court of Cook County temporarily barring Serfecz from the premises. (District Court Opinion at 44, Respondents' Appendix p. 67a). Jewel then asked the court to decide whether, under the lease, Serfecz' refusal to approve United Skates as a subtenant, on the ground that United Skates' subtenancy would increase Serfecz' insurance costs, was proper. The key issue at trial turned out to be which party had the burden of proof on the issue of whether United Skates as a subtenant would increase Serfecz' insurance costs. The trial court held that Jewel had the burden of proof on this issue, and that Jewel had failed to meet that burden.

D. The Origin of the Antitrust Litigation

In December 1991, Serfecz told Jewel that a company called Grove Central Grocers, Inc. ("Grove Grocers") was interested in subleasing Jewel's vacant space. Because Grove Grocers was a new start-up company unknown to Jewel, Grove Grocers was asked to provide basic financial information and a business plan to establish its creditworthiness. This information was never provided. Instead, Serfecz filed a declaratory judgment action and a motion for a temporary restraining order in the Circuit Court of Cook County, seeking possession of Jewel's premises and an order directing Jewel to sublease its space to Grove Grocers. In this state court action, Serfecz claimed that Jewel was violating federal and state antitrust laws as well as state common law by keeping vacant the Jewel premises in Grove Mall and by refusing to lease its space to Grove Grocers.

On February 26, 1992, after a full hearing on Serfecz' motion for a temporary restraining order, Judge Francis Barth of the Circuit Court of Cook County denied Serfecz' request in its entirety and questioned the merit of his declaratory judgment action. In light of Judge Barth's ruling, Serfecz voluntarily dismissed his state court action and immediately filed this federal court action, essentially recasting his state court allegations as federal antitrust claims.

On June 25, 1992, Serfecz filed a four-count complaint in federal court against Jewel and several other defendants. Count I alleged that Jewel violated Sherman Act Section 1 by conspiring to restrain trade in two distinct product markets — "grocery and grocery-related items" and the "operation of a retail shopping center." Count II alleged that Jewel had violated Sherman Act Section 2 by monopolizing, attempting to monopolize and conspiring to monopolize the same two product markets. Count III alleged that Jewel was liable for malicious

prosecution by bringing prior state court lawsuits. Count IV alleged that Jewel breached its lease with Serfecz.

On August 30, 1994, Judge Grady of the District Court for the Northern District of Illinois granted summary judgment for Jewel on all antitrust counts (plus one state law count), leaving Serfecz with a single remaining claim for breach of lease. (District Court Opinion at 1, Respondents' Appendix p. 30a). (This breach of lease claim is set for trial in June of 1996.[2]). On September 26, 1995, after a full briefing and oral argument, the Seventh Circuit Court of Appeals affirmed the District Court's ruling in its entirety. (Seventh Circuit Opinion at 2, Respondents' Appendix p. 2a).

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2. In his Petition, Serfecz states that "[o]n or about February 1, 1994, plaintiffs entered into a development contract with Joseph Freed and Associates, a real estate development company. The agreement is contingent upon obtaining possession of the premises claimed by Jewel. Plaintiff is unable to go any further toward redevelopment while Jewel claims possession of the premises." (Petition at 4).

Serfecz has failed to disclose that on February 14, 1994, the Village of Elk Grove held a hearing to declare the Grove Mall a blighted area and filed an action for condemnation against Serfecz and the Grove Mall in January 1995. Jewel's premises are included as part of the action. The condemnation proceeding seeks to provide Serfecz with reasonable compensation in exchange for which the Village of Elk Grove will obtain ownership rights to Serfecz' property. It is the condemnation proceeding, not Jewel's continued possession of the premises, that has prevented Serfecz from contracting with a developer to revitalize the Grove Mall.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY HELD THAT SERFECZ LACKS STANDING TO ASSERT THAT JEWEL'S CONDUCT IN THE RETAIL GROCERY STORE MARKET VIOLATED THE ANTITRUST LAWS.

Serfecz now petitions this Court to review one issue — whether the Seventh Circuit properly held that Serfecz, the owner of a retail shopping center, lacks the requisite direct injury to have standing to assert that Jewel monopolized, or conspired with others to monopolize, the retail grocery market in violation of the Sherman Act. In his Petition for A Writ of Certiorari ("Petition"), Serfecz argues that this Court should grant certiorari because the Seventh Circuit's decision is contrary to the Court's precedent on standing and conflicts with the decisions of other circuits.[3] The Seventh Circuit's decision does not depart from Supreme Court precedent, create a split in the circuits, present a novel question of law or otherwise raise an issue that this Court should address. Indeed, review of this case will require this Court to do nothing more than rehash the standing analysis that it put into place years ago and to which the Seventh Circuit and other circuits have faithfully adhered.

Contrary to Serfecz' assertions, the Seventh Circuit's analysis cites and adheres to the Supreme Court's analysis of standing as set out in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477

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3. Although he fails to cite to the Supreme Court rule which sets forth the factors considered by the Court in deciding whether to grant a Petition, Supreme Court Rule 10(a) must be the basis for Serfecz' Petition.

(1977). Furthermore, the Seventh Circuit's opinion is consistent with the substantial body of law generated by the circuit and district courts, several of which address standing based upon facts virtually indistinguishable from those in this case and reach the same conclusion as the Seventh Circuit.

Finally, denial of Serfecz' Petition will not leave him without a remedy for his alleged injury. This lawsuit is an attempt by Serfecz to convert a commercial landlord-tenant dispute into a federal antitrust action. Ironically, the district court recognized that Serfecz had stated one claim, for breach of lease, which is scheduled to be tried in June 1996. Thus, denying Serfecz standing to assert a claim under the antitrust laws does not bar him from the courthouse; it only precludes him from seeking the extraordinary remedy of treble damages. That result is consistent with this Court's view of antitrust standing, which limits the availability of this extraordinary remedy to only those plaintiffs who are most directly affected by an antitrust violation and whose injury is of the type the antitrust laws are designed to prevent. Under the facts of this case, Serfecz is not one of those plaintiffs.

A. The Seventh Circuit Applied the Proper Analytic Framework in Evaluating Whether Serfecz Had Standing to Sue Under the Antitrust Laws.

The Seventh Circuit began its analysis by recognizing that Clayton Act § 4, 15 U.S.C. § 15, the sole source of Serfecz' private right of action to sue for violations of the Sherman Act, despite its seemingly broad language, has been construed by this Court to limit the parties who may bring an antitrust action. In *Brunswick*, this Court held that the ability to maintain an antitrust action would be limited to those who have suffered the type of injury that the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. *Brunswick*, 429 U.S. at 489. *Associated General Contractors*,

focusing on Congress' intent to have the antitrust laws construed in light of the common law, reaffirmed and expanded upon *Brunswick*, by reading Clayton Act Section 4 to contain a proximate cause element. This proximate cause element acts to deny standing to plaintiffs whose injuries are indirect or secondary, particularly when there exist more directly affected parties. *Associated General Contractors*, 459 U.S. at 540-46. It was these principles that the Seventh Circuit applied to find that Serfecz had not established that: (1) he had suffered antitrust injury; and (2) in light of the remoteness of his injury, he was otherwise a proper plaintiff to maintain this antitrust action. (Seventh Circuit Opinion at 7-12, Respondents' Appendix pp. 7a-13a).

B. Serfecz Has Not Suffered Antitrust Injury.

Applying the principles set forth in *Associated General Contractors* and *Brunswick*, the Seventh Circuit correctly found that Serfecz, the owner of a retail shopping mall, did not have standing to assert a cause of action for antitrust violations allegedly committed by a grocery store tenant; violations which allegedly had their focus and impact in the retail grocery market. Although Serfecz claims to have been harmed by Jewel's failure to sublease its Grove Mall space to another grocer, a private antitrust plaintiff does not acquire standing merely by showing that defendant's conduct injured him.[4] In addition to establishing a link between the defendant's acts and the plaintiff's injuries, this Court has held that:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive

4. Jewel was not required by its lease to sublease to another grocer.

> effect, either of the violation or of the anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick, 429 U.S. at 489.

In its opinion, the Seventh Circuit noted that this test focuses on the "connection between the purpose of the antitrust laws (protecting market competition) and the alleged injury" and explained that

> [w]hen the plaintiff's injury is linked to the injury inflicted upon the market, such as when customers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust laws — the preservation of competition.

(Seventh Circuit Opinion at 8, Respondents' Appendix p. 9a). The Seventh Circuit reasoned that if Jewel's goal was to gain control of the retail grocery market in Elk Grove Village, Illinois, the damages claimed by plaintiffs (devaluation of Grove Mall) did not present the type of anticompetitive injury that the antitrust laws were intended to remedy. (Seventh Circuit Opinion at 10, Respondents' Appendix p. 11a).

In reaching this conclusion the Seventh Circuit examined the plaintiff's status vis-a-vis the relevant market. (Seventh Circuit Opinion at 8-9, Respondents' Appendix pp. 8a-10a). The court described Serfecz as a "supplier" to the retail grocery market and noted that suppliers to direct market participants

typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered "antitrust injuries." (Seventh Circuit Opinion at 8, Respondents' Appendix at 9a). (*citing Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1379 (7th Cir. 1987)).[5] Contrary to Serfecz' argument that the Seventh Circuit's analysis of his status in the market is inappropriate, this Court's standing precedent calls for just such an evaluation.[6]

The Seventh Circuit's holding that Serfecz did not suffer antitrust injury is consistent with decisions of other courts faced with facts virtually identical to those in this case. For instance, in *South Haven Land Co. v. Malone and Hyde, Inc.*, 715 F.2d 1079

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5. Suppliers consistently have been denied standing to challenge antitrust violations occurring in a market other than the market in which they compete. *See Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 290-291 (6th Cir. 1992) (broker of snacks and candies lacked standing to bring antitrust action against product manufacturer); *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1588 (1993) (storage facility operator lacked standing to bring antitrust action against soda ash producer); *Adams v. Pan American World Airlines, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). As a result, landlords typically have been denied standing to assert an antitrust claim for a violation occurring in a tenant's market. *R.C. Dick Geothermal Corp. v. Thermogenics*, 890 F.2d 139 (9th Cir. 1989); *Melrose Realty Co. v. Loew's*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Harrison v. Paramount Pictures*, 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir), *cert. denied*, 348 U.S. 828 (1954).

6. Neither is the Seventh Circuit's opinion a rejuvenation of the "target area" approach to standing. Nonetheless, to the extent the "target area" approach embodied the concept that a plaintiff whose injury which was indirectly or remotely related to the antitrust violation was not an appropriate plaintiff to bring a treble damage claim, that concept survives in the Supreme Court's current precedent and was considered by the Seventh Circuit in this case. (Seventh Circuit Opinion at 8-10, Respondents' Appendix pp. 9a-11a).

(6th Cir. 1983), the Sixth Circuit held that an owner-lessor of retail commercial space did not have standing to maintain an antitrust action against a grocery store retailer who did not release its rental space to allow the plaintiff to lease the space to a different grocery store. The Sixth Circuit held that the plaintiff's injury (rental devaluation) as a supplier of retail space to direct participants in the retail grocery market was not "sufficiently linked to the procompetitive policy of the antitrust laws." *South Haven*, 715 F.2d at 1087. Like the Seventh Circuit in this case, the Sixth Circuit in *South Haven* cited *Rosenberg v. Cleary, Gottlieb, Steen & Hamilton*, 598 F. Supp. 642 (S.D.N.Y. 1984), which held that the owner of a shopping mall alleging a conspiracy designed to keep him from opening a grocery store in his mall lacked standing because the owner was not a direct participant in the retail grocery market.

Finally, Serfecz' discussion of several cases, which purport to grant antitrust standing to suppliers like Serfecz, misconstrues those opinions. For example, a careful reading of *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the case which serves as the springboard for Serfecz' argument, reveals that the case undermines Serfecz' position. There, a subscriber to Blue Shield's health care plan complained when Blue Shield refused to reimburse its insureds for psychotherapy services performed by psychologists as opposed to psychiatrists. The Court conferred standing on the plaintiff because her injury was inextricably intertwined with the injury to the psychotherapy market. *McCready*, 457 U.S. at 485. The plaintiff in *McCready* was a consumer of psychotherapy services performed by psychologists and, as such, was a classic antitrust plaintiff. *American Agric. Movement v. Board of Trade*, 848 F. Supp. 814, 824 (N.D. Ill. 1994). As a consequence, the harm she sustained — whether it was a reduction of service provider choice or higher prices resulting either from a lack of reimbursement or the psychiatrist's ability to raise service fees — was classic antitrust injury.

Similarly, in *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3rd Cir. 1993), the plaintiff steel company sued the defendant railroads for restraining competition in the unloading and transportation of iron ore. The steel company sued for damages for excessive transport charges caused by the railroad's anticompetitive behavior because, as a customer, they were directly affected by the increase in transport charges. The remaining cases cited by petitioners — *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 843 F. Supp. 759 (D.Me. 1994), and *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986) — are inapplicable to the case before the Court because all three involved employees who were forced to be part of the anticompetitive scheme devised by their employers.

C. Serfecz is Not An Appropriate "Private Attorney General."

The Seventh Circuit also denied Serfecz' standing based upon another factor cited in *Associated General Contractors*. The Court of Appeals ruled that even if Serfecz could establish antitrust injury, "only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under Section 4."[7] (Seventh Circuit Opinion at 10, Respondents' Appendix p. 11a). (*citing In*

7. The complaint in this case seeks relief only for Jewel's allegedly anticompetitive conduct directed against Serfecz' retail shopping center. Nevertheless, Serfecz suggests that Jewel's conduct in Elk Grove Village is part of a state-wide scheme to stifle competition and that, unless Serfecz is allowed to maintain this action, Jewel will never be held accountable for its allegedly unlawful conduct. Although Jewel contests the admissibility of the evidence on which this argument is based, the Seventh Circuit considered and rejected this claim in the context of Serfecz' antitrust claim relating to the retail shopping center market. (Seventh Circuit Opinion at 17-18, Respondents' Appendix pp. 19a-20a). Allegations about Jewel's conduct that is unrelated to Serfecz' alleged injury in this case is irrelevant to the question whether Serfecz has standing to maintain his action against Jewel.

Re Industrial Gas Antitrust Litig., 681 F.2d at 516). "The existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest and antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general . . . [particularly when denying standing] it is not likely to leave a significant antitrust violation undetected or unremedied." *Associated General Contractors*, 459 U.S. at 542.

The Seventh Circuit recognized that if competing grocery stores had been precluded from the market and injured by Jewel's actions, their injuries would be direct and they could maintain an antitrust action against Jewel. Similarly, grocery consumers could maintain an action if Jewel's actions stifle competition and allow Jewel to engage in monopoly pricing in the retail grocery market. (Seventh Circuit Opinion at 10-11, Respondents' Appendix pp. 11a-12a).

In this case, there are both more direct victims of the alleged antitrust violation and victims with resources sufficient to pursue an antitrust action. To grant Serfecz standing to sue would not enhance enforcement of the antitrust laws; rather it would open the door to plaintiffs increasingly further removed from the gravamen of the alleged antitrust violation. The standing analysis developed by this Court was intended to prevent this result. *See Alpha Shoe Serv. v. Fleming Cos.*, 849 F.2d 352 (8th Cir. 1988), *cert. denied*, 488 U.S. 942 (1988) (court rejected suit by shopping center tenants against grocery store anchor who vacated its space for extended period of time because plaintiffs were not competitors, participants, or consumers in the relevant market).

CONCLUSION

The Seventh Circuit's analysis of Serfecz' standing to maintain this antitrust action adheres to this Court's well-established precedent and is consistent with the decisions rendered by courts in other circuits in factually comparable cases. Serfecz has presented no legitimate basis for this Court to review the issue raised in this case or the lower courts' disposition of it. Jewel therefore requests that this Court deny Serfecz' Petition.

Respectfully submitted,

DAVID MARX, JR.
Counsel of Record
ANNE PRAMAGGIORE
McDERMOTT, WILL & EMERY
Attorneys for Respondents
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 26, 1995

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 94-3211, 94-4017, 95-1201

JOSEPH SERFECZ and
FIRST CHICAGO TRUST,

Plaintiffs-Appellants,

v.

JEWEL FOOD STORES, et al.,

Defendants-Appellees.

United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92 C 4171—**John F. Grady,** *Judge.*

ARGUED MAY 11, 1995—DECIDED SEPTEMBER 26, 1995

Before CUDAHY, ESCHBACH and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Joseph Serfecz and First Chicago Trust Company of Illinois ("First Chicago Trust") have ownership interests in the Grove Mall in Elk Grove Village, Illinois. They claim that Jewel Food Stores ("Jewel"), American

Stores Properties, Inc. ("American Properties"), and the developers of competing Elk Crossing Mall have conspired to run Grove Mall out of business and to monopolize the retail grocery and shopping center markets in Elk Grove Village. They brought this action alleging defendants violated the Sherman Act, 15 U.S.C. §§ 1, 2. They also alleged supplemental state law claims of malicious prosecution and breach of lease. The district court granted the defendants' motions for summary judgment with regard to the antitrust and malicious prosecution claims and granted a partial summary judgment with regard to the breach of lease claim. Mr. Serfecz and First Chicago Trust now appeal that judgment.[1] For the reasons set forth below, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

In 1963, Jewel entered into a lease for retail space in Grove Mall. Jewel's lease ran until 1986 and provided Jewel with three five-year options to renew. In 1977, Mr. Serfecz purchased Grove Mall and assumed all existing leases including the Jewel lease. In 1986, Jewel exercised its first option to renew and in 1991 it exercised its second option. Jewel's current lease expires

1. The district court had jurisdiction of Counts I and II under 15 U.S.C. § 26 and 28 U.S.C. § 1337. The district court had supplemental jurisdiction over Counts III and IV under 28 U.S.C. § 1367(a). On January 10, 1995, the district court granted defendants' motion for summary judgment on Counts I, II, III and part of IV. The court did not grant summary judgment as to the portion of Count IV claiming breach of lease due to an unlawful use of the premises. Pursuant to Federal Rule of Civil Procedure 54(b), the district court determined that there was no reason to delay entry of final judgment in favor of defendants on all claims except the unlawful use claim in Count IV or to delay appeal from that judgment.

in 1996 and, based upon the remaining five-year option, may be extended until 2001.

From 1963 until 1987, Jewel owned and operated a grocery store in its leased premises at Grove Mall. In October 1987, Jewel vacated the premises and moved its grocery operation across the street to the newly constructed Elk Crossing Mall. Since its move, Jewel has continued to pay rent and has exercised its second option to renew the lease. Jewel has refused to give up its leasehold interest in the premises and its retail space has remained unoccupied. Jewel proposed to sublet the space to United Skates of America ("United Skates") for use as a roller skating rink. Mr. Serfecz objected to this proposed sublease because he believed occupancy by United Skates would ruin Grove Mall as a retail center and increase his insurance liability. In 1990, Jewel filed an action in state court that sought a declaratory judgment regarding its right to sublet. The Illinois trial court ruled against Jewel; it held that the express provisions of the lease gave Mr. Serfecz the right to refuse any sublet that would increase his insurance rates. The appellate court affirmed.

Mr. Serfecz, joined by First Chicago Trust,[2] brought this action against Jewel, American Properties,[3] United States,[4] and the developers and operators of the Elk Crossing Mall.[5] That

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2. First Chicago Trust Company of Illinois, Trustee of Trust No. 684 is the title holder of Grove Mall. Joseph Serfecz is the beneficial owner of the trust.

3. American Properties, Inc. is the company that manages properties owned and rented by Jewel.

4. United Skates of America, Inc. is an Ohio Corporation that operates roller skating rinks and is licensed and doing business in Illinois.

5. The complaint lists five defendants connected with the development of (Cont'd)

complaint claimed that the defendants conspired to devalue and to destroy Grove Mall in order to eliminate competition in the retail grocery and shopping center markets. The plaintiffs contend that the defendants conspired to keep the Jewel rental space empty, to prevent a major anchor tenant from taking over Jewel's rental space, to obstruct Mr. Serfecz's attempt to redevelop Grove Mall, and to coerce Grove Mall tenants to leave and move across the street to Elk Grove Mall. The plaintiffs maintain that the alleged conspiracy is part of an overall marketing strategy of restricting the use of property in order to keep out competitors and to restrain trade. In Counts I and II of their complaint, plaintiffs alleged defendants violated § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In Count III plaintiffs allege Jewel's declaratory judgment action regarding the United Skates sublet was malicious prosecution and in Count IV allege breach of lease by Jewel.

B. *The Antitrust Laws: The Relevant Statutory Provisions*

Section One of the Sherman Act prohibits anticompetitive activities designed to restrain unreasonably trade and bans "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." 15 U.S.C. § 1. Section Two prohibits monopolistic practices and provides sanctions for "[e]very person who shall monopolize, or attempt

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Elk Crossing Mall: Patrick F. Daly and Associates, Inc., the architect for Elk Crossing Mall; D.E.I., Inc., the contract purchaser of the land on which the Elk Crossing Mall was built; Dalan/Jupiter, Inc., a developer of Elk Crossing Mall; Mid-America Real Estate Corporation, the leasing agent for Dalan/Jupiter, Inc. and Elk Crossing Mall; and Patrick F. Daly, an officer, director, and shareholder of Patrick F. Daly and Associates, Inc., D.E.I., Inc., and Dalan/Jupiter, Inc., and owner of a limited partnership interest in Elk Crossing Mall.

to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. . . ." 15 U.S.C. § 2.

Section Four of the Clayton Act defines the class of persons who may bring a private suit under the antitrust laws. Section Four provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. The Supreme Court has held that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). The language of § 4 has been construed to limit the parties who may bring an antitrust action to (1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of defendant's unlawful conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Court, focusing on Congress' intent to have antitrust laws construed in light of the common law, also has read § 4 to contain a proximate cause element, denying standing to plaintiffs whose injuries are indirect or secondary. *Associated Gen. Contractors, Inc. v. California State*

Council of Carpenters; 459 U.S. 519, 540-46 (1983). The Court has identified several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages. *Associated Gen. Contractors*, 459 U.S. at 537-46; *see also Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1562 (7th Cir.), *cert. dismissed*, 502 U.S. 903 (1991).

C. *The District Court Proceedings*

The district court granted the defendants' motion for summary judgment on the antitrust claims. With respect to the monopolization of the retail grocery market claim, the court held that the plaintiffs lacked antitrust standing. The court held that the plaintiffs had presented enough evidence for a trier of fact to find that Jewel acted deliberately to prevent a competitor from occupying Jewel's rental space and to find a causal connection between the absence of a grocery store anchor tenant and the demise of Grove Mall. The court concluded that plaintiffs' injury was, nevertheless, too indirect to confer standing with respect to the retail grocery market. With respect to the retail shopping center market, the court determined that the plaintiffs had standing, but that they had failed to establish a genuine issue of triable fact as to the existence of the conspiracy among the defendants to restrain trade and to monopolize sales and development in this market.

The district court also granted defendants' motion for summary judgment on the malicious prosecution claim. It held that plaintiffs had failed to allege a special injury. The court additionally granted defendants' motion for summary judgment on the breach of lease claim insofar as the plaintiffs' claim was based upon Jewel's failure to continue operating as a grocery store at Grove Mall. The court denied the defendants' motion to the extent that the plaintiffs' claim was based upon the illegal use provision of the lease. It determined that the broad non-restrictive wording of the illegal use provision prohibited using the premises to violate the antitrust laws. The court reasoned that, although the plaintiffs lacked antitrust standing to recover damages for the monopolization of the grocery market, they did have standing, as parties to the lease, to sue for breach of the lease provision relating to violations of the law, arguably including violation of § 2 of the Sherman Act. In the district court's view, "use of the leased premises in furtherance of a Section 2 antitrust violation could indeed constitute a breach of the lease." Mem. Op. at 38. As we have noted earlier, *supra* n.1, this issue is not before us today.

II
DISCUSSION

We review de novo the district court's grant of summary judgment. We evaluate the evidence in a light most favorable to the nonmoving party. *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994). Summary judgment is appropriate when the pleadings and supplemental materials present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To survive a

defendant's motion for summary judgment, a plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S 574, 585-86 (1986); *Greater Rockford Energy & Technology Corp.*, 998 F.2d at 394.

A. *The Antitrust Claims*

The Sherman Act was enacted "to assure customers the benefits of price competition, and . . . protect[ ] the economic freedom of participants in the relevant market." *Associated Gen. Contractors*, 459 U.S. at 538; *see Sanner v. Board of Trade*, Nos. 94-2139, 94-2152, slip op. at 15 (7th Cir. Aug. 7, 1995). In this case, there are two relevant markets—the retail grocery market and the retail shopping center market. In order to maintain an antitrust action, plaintiffs must establish that they (1) have suffered an antitrust injury and (2) are the proper plaintiffs to maintain an antitrust action with respect to each of these markets. *See Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986); *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983).

1. The Retail Grocery Market

The district court determined that plaintiffs had presented enough evidence to permit a trier of fact to conclude that defendants had acted deliberately to prevent a competitor from occupying Jewel's rental space and that the absence of a grocery store anchor tenant was a significant cause of Grove Mall's decline. A private antitrust plaintiff, however, does not acquire standing merely by showing that he was injured by the defendant's conduct. In addition to establishing a link between

the defendant's acts and the plaintiff's injuries, the Supreme Court has held that:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp., 429 U.S. at 489 (citations omitted). This test focuses on the connection between the purpose of the antitrust laws (protecting market competition) and the alleged injury. When the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust law—the preservation of competition.

It is not contested that Mr. Serfecz brings this action neither as a consumer nor as a competitor in the retail grocery market, but as a lessor of rental space to competitors in this market. Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered "antitrust injuries." *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1379 (7th Cir. 1987); *see also Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)

("[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other."); *Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 290-91 (6th Cir. 1992) (holding that injury to broker through loss of commission was not "antitrust injury"). In *Southwest Suburban*, a trade association that provided listing services to real estate brokerage firms alleged that the defendants conspired to boycott, and encouraged customers to boycott, the plaintiff's listing service. Consequently, the trade association was unable to provide a comprehensive listing of properties to its subscribers. The defendants allegedly had taken action directly against the trade association to reduce the value of its listing in order to exclude non-preferred brokers from the real estate brokerage services market. The court held, however, that the defendants' anti-competitive practice was directed at the members of the trade association, not the trade association itself, and that any injury to the trade association, as a supplier of listing services, was too remote from the antitrust violation to confer standing. *Southwest Suburban*, 830 F.2d at 1379. We believe that the plaintiffs are in a similar position to that trade association and are best characterized as suppliers to the market participants, retail grocery stores and grocery purchasers.

In *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), our colleagues in the Sixth Circuit held that an owner-lessor of retail commercial space did not have standing to maintain an antitrust action against a grocery store retailer who would not release its rental space to allow the plaintiff to lease the space to a different grocery store. The plaintiff claimed that the defendants intended to monopolize the retail grocery market by destroying the site as a location for the operation of a retail grocery outlet. The Sixth Circuit held that the plaintiff's injury (rental devaluation) as a supplier of retail space to direct

participants in the retail grocery market was not "sufficiently linked to the pro-competitive policy of the antitrust laws." *Southaven*, 715 F.2d at 1087; *see also Rosenberg v. Cleary, Gottlieb, Steen & Hamilton*, 598 F. Supp. 642 (S.D.N.Y. 1984) (holding that owner and developer of shopping mall alleging defendants conspired to keep it from opening a grocery store by filing state court lawsuits and preventing building permits from being issued lacked standing because developer was not a direct participant in the retail grocery market).

Here, the plaintiffs' injury is not the direct effect of the defendants' anticompetitive conduct. Assuming Jewel's goal was to gain control of the retail grocery market in Elk Grove, Illinois, we do not believe that the damages claimed by plaintiffs (devaluation of Grove Mall) present the type of anticompetitive injury that the antitrust laws were intended to remedy. *See Sanner*, Nos. 94-2139, 94-2152, slip op. at 14-15 (7th Cir. Aug. 7, 1995).

Even if plaintiffs' injury could be characterized as an antitrust injury, this factor alone would not confer standing: "From the class of injured persons suffering an 'antitrust injury' only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4." *In re Industrial Gas Antitrust Litig.*, 681 F.2d at 516. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general . . . [particularly when denying standing] is not likely to leave a significant antitrust violation undetected or unremedied." *Associated Gen. Contractors*, 459 U.S. at 542. Our decisions have recognized the

need to balance the interests of deterrence through private antitrust enforcement and avoidance of excessive treble damages litigation. "An appropriate balance is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct." *In re Industrial Gas Antitrust Litig.*, 681 F.2d at 520. If the competing grocery stores have been precluded from the market and injured by defendants' actions, their injuries would be direct and they could maintain an antitrust action against the defendants. *See Southwest Suburban*, 830 F.2d at 1379-80; *Southaven*, 715 F.2d at 1086-87; *In re Industrial Gas Antitrust Litig.*, 681 F.2d at 520. Similarly, grocery consumers could maintain an action if defendants' actions stifled competition allowing defendants to engage in monopoly pricing in the retail grocery market.[6] Suppliers of rental space to grocery retailers are not the proper parties to maintain an antitrust action with respect to the defendants' alleged monopolistic and anticompetitive activities in the retail grocery market.[7] In sum, we hold that these plaintiffs

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6. *See Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1563-65 (7th Cir.), *cert. dismissed*, 502 U.S. 903 (1991) (holding that patients who were denied medical treatment on non-emergency basis had standing to bring antitrust action against medical center); *Ball Memorial Hosp., Inc. v. Mutual Hosp., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986) ("When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust."); *see also* II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1370 at p. 253 (Rev. ed. 1995) ("Because protecting consumers from monopoly pricing is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted.").

7. *See Southwest Suburban*, 830 F.2d at 1379-80; *Southaven*, 715 F.2d at 1086-87; *In re Industrial Gas Antitrust Litig.*, 681 F.2d at 520; *see also*

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do not have the requisite direct injury to have standing to assert that Jewel has monopolized, or conspired with others to monopolize, the retail grocery market. We express no opinion on whether, in a suit brought by another plaintiff who can show the requisite direct injury, such allegations could be established.

2. Retail Shopping Center Market

The plaintiffs' antitrust allegations are not limited to the retail grocery market. They also allege that the defendants had conspired to restrain trade and to monopolize sales in the retail shopping center market. Here, the district court quite correctly

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International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1329 (3d Cir. 1992) (holding that operator of storage facility who was neither a consumer nor producer of soda ash lacked standing to bring antitrust action against producers of soda ash where direct participants in market would be better plaintiffs), *cert. denied*, 113 S. Ct. 1588 (1993); *Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 290-91 (6th Cir. 1992) (concluding that broker of snacks and candies lacked standing to bring an antitrust action against snack and candy manufacturer where targets of alleged conspiracy, competing manufacturers and wholesale customers, were more direct victims); *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213-14 (8th Cir. 1991) (determining that broker who solicited orders for resale of product and was not a consumer or competing manufacturer or distributor lacked standing to bring antitrust action against manufacturers and distributor of product); *Peck v. General Motors Corp.*, 894 F.2d 844, 847-48 (6th Cir. 1990) (holding that owners and officers of automobile dealership who were neither consumers nor competitors in automobile market lacked standing to bring antitrust action against automobile manufacturer); *Henke Enters v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 489-90 (8th Cir. 1984) (concluding that owner of hardware store in shopping center lacked standing to bring antitrust action against owner of grocery store who anchored mall and upon vacating mall prohibited assignee from leasing property to another grocery store because hardware store was neither competitor nor consumer in the retail grocery market).

determined that the plaintiffs, who are direct participants in this market, alleged an injury that is sufficiently direct to give them standing.

Section One of the Sherman Act prohibits the formation of any "contract, combination or conspiracy in restraint of trade or commerce. . . ." 15 U.S.C. § 1. To establish a violation of § 1 of the Sherman Act, plaintiffs must provide, therefore, evidence that "tends to exclude the possibility of independent action by the [defendants]." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). When a plaintiff relies on circumstantial evidence, as is very often the case, he "must show that the inference of conspiracy is reasonable in light of the competing inference[ ] of independent action." *Matsushita*, 475 U.S. at 588; *see Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 (1992). Because there is often only a fine line separating unlawful concerted action from legitimate business practices, "[c]onduct [that is] as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. In *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990), we set forth our approach to evaluating the legal sufficiency of the evidence in antitrust conspiracy cases. We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the plaintiff as it is with illegal conspiracy. Finally, if we determine that this analysis leaves the evidence of conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests. *Id.* at 1171-72.

Appendix A

Plaintiffs submit that Jewel and the Elk Crossing defendants engaged in a conspiracy to restrain trade in the retail shopping center market. They point out that both Jewel and the Elk Crossing defendants had a compelling motive to eliminate Grove Mall as a competitor. They also note that the Elk Crossing defendants built Elk Crossing without investigating the possibility that Grove Mall would be redeveloped and emerge as a competitor. They further point out that Jewel and the Elk Crossing defendants have built other shopping centers with Jewel as an anchor tenant, where Jewel obtained restrictions precluding the use of its old leasehold location as either a retail food store or a drug store.

Plaintiffs submit that defendants conspired to have Jewel anchor Elk Crossing while preventing a major anchor tenant from taking over Jewel's rental space in order to block Mr. Serfecz's attempt to redevelop Grove Mall. The anticompetitive conduct about which the plaintiffs complain involves two separate activities — Jewel's move to Elk Crossing and Jewel's attempted sublease to United Skates and refusal to relinquish its leasehold interest. The defendants have provided evidence showing that Jewel's move to Elk Crossing is compatible with their legitimate business interests. Jewel argues that its move to Elk Crossing was based upon legitimate business concerns; Elk Crossing offered Jewel a new, updated, and larger space and the ability to open a companion Osco drugstore; Jewel could not operate a drugstore in Grove Mall because Walgreens possessed the exclusive right to operate a drugstore at Grove Mall. The Elk Crossing defendants argue that their interest in Jewel is based upon the desirability of Jewel/Osco as an anchor tenant for a neighborhood shopping center. Elk Crossing and Jewel therefore have proffered legitimate business reasons for Jewel's decision to move to Elk Crossing and for Elk Crossing's desire to have Jewel as a tenant.

Jewel's actions relating to its Grove Mall lease are more problematic. The plaintiffs argue that Jewel attempted to sublet to United Skates in order to destroy Grove Mall as a retail shopping center because a roller rink anchor tenant is inconsistent with that use. The plaintiffs contend that Jewel, knowing that the lease prohibited subleases that would increase insurance rates absent the owner's consent, initiated the state declaratory judgment action in order to discourage potential retailers interested in subleasing the space and to tie up the plaintiffs in litigation. Jewel counters that its attempted sublease to United Skates was based on its desire to earn rent on the vacant space; it makes no argument, however, with regard to the continued payment of rent for the vacant space. Moreover, Jewel's explanation does not offer any legitimate business justification for its failure to minimize its rental payments on vacant space by accepting Mr. Serfecz's offer to pay United Skates rent or to release Jewel from the lease. Although this lack of explanation on Jewel's part may evidence an anticompetitive motivation on its part, it does not permit, by itself, an inference of a conspiracy on the part of Jewel with the owners of Elk Crossing. Absent some showing that Jewel has held onto its lease with Grove Mall because of an agreement with the Elk Crossing defendants, we cannot say that the record supports a violation of § 1 of the Sherman Act. We therefore turn to the remainder of the plaintiffs' contentions in order to determine if they have demonstrated that the record raises a genuine issue of triable fact as to an agreement between Jewel and Elk Crossing.

We turn first to the evidence of motive. The plaintiffs argue that Jewel and the Elk Crossing defendants both had a compelling motive to destroy Grove Mall as a viable competitor. According to plaintiffs, the value of Elk Crossing is inflated because of a lack of alternate space and competitors. Therefore,

the Elk Crossing owners have been able to charge high rental prices, obtain a multimillion dollar mortgage and permit the Elk Crossing partners to withdraw $7 million in excess value within two years after the mall was completed. The lack of competition also has permitted Jewel to reap the benefits of having a "captive population" because it is the only retail grocery store in the area. Both defendants certainly have a motive to pursue their respective economic objectives free of competition from a redeveloped Grove Mall. However, it is important to note that proof of motive is of limited utility in this context. Although a lack of motive may be evidence that parties did not conspire, the presence of an economic motive is of very little probative value. *See Matsushita*, 475 U.S. at 596-97 ("Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."). The mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy. *Riverview Inves., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 483-84 (6th Cir.), *cert. denied*, 498 U.S. 855 (1990). We agree with the district court that the mere confluence of economic interests between the parties does not establish, standing alone, the existence of a conspiracy.

The plaintiffs next argue that defendants built Elk Crossing knowing that there would be no competition from Grove Mall. They presented testimony that one of the key concerns of a developer planning to build a shopping center is the presence of current or future competition. Kenneth Leonard, a real estate consultant, testified that he knew of no reputable,

knowledgeable developer or chain store who did not consider the threat of competition a most important consideration when undertaking a development project. Neither Jewel nor the Elk Crossing defendants have produced evidence that a market analysis or feasibility study was conducted concerning possible future competition.[8] The Elk Crossing defendants argue that they had no incentive to do such a study or analysis and dispute the importance of conducting such studies. The failure of the Elk Crossing developers to take the precautionary step of undertaking a market study is not, in our view, sufficiently indicative in itself of an agreement to justify denial of summary judgment. This evidence could not support a jury finding of conspiracy between the Elk Crossing owners and Jewel. It raises, at best, the "metaphysical doubt" that *Matsushita,* 475 U.S. at 585, counsels is not sufficient to submit the issue to a jury. We agree with the district court that the fact that the defendants believed that Elk Crossing would be able to compete successfully with the less modern mall across the street does not supply a basis for inferring a conspiracy.

Plaintiffs also point to two instances in which Patrick F. Daly and his architectural firm have engaged in "similar conduct" with Jewel in developing other shopping centers. The first is the Hickory Hills shopping center. In 1985, Patrick F. Daly & Associates, Inc. was employed as the architectural firm

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8. Leonard testified that the documents that the defendants produced for review contained no information as to competition. In regard to the absence of documents relating to competition, Leonard testified that: "It is so strange that this one critical piece of information that everybody else in the world looks to as being vital, that they agonize endlessly over, nobody, two of the most sophisticated people around, supposedly didn't even mention it. You have a sophisticated development group and a sophisticated chain store group, smart, very smart people, and they both like forgot, they had mental lapses." R.221-22, Ex.2 at 110-11.

for the shopping center, and Mr. Daly had an ownership interest in the development. Prior to the development of Hickory Hills, Jewel was located across the street and when Jewel moved it obtained a restriction on its former leasehold location. The second instance is the Scharrington Square shopping center in Schaumburg, Illinois. Patrick F. Daly & Associates, Inc. was employed as the architectural firm and Mr. Daly had an ownership interest in the development.[9] Prior to the development of Scharrington Square, Jewel had been located in a nearby shopping center. Jewel obtained a restriction on the old leasehold location so that the premise could not be leased to any person or entity whose primary business was either the retail sale of food or prescription drugs.

The plaintiffs can point to no evidence showing Daly's involvement with Jewel's negotiations of the lease restrictions. The fact that Daly's architectural firm has worked on a number of shopping centers that are anchored by Jewel and that Daly has invested in these shopping centers create an inference of Daly's ability to attract business more than it creates an inference of a conspiracy.

The plaintiffs describe their theory of the case in these terms:

> [T]he Elk Crossing defendants have an ongoing relationship with Jewel. The Elk Crossing defendants build and own new shopping centers in locations where Jewel

9. Dalan/Jupiter, Inc. was the company responsible for the development of the shopping center. Neither party has given a clear description of Mr. Daly's relationship to Dalan/Jupiter, Inc. though both admit that he was an officer, owner, or shareholder.

> has an old store nearby. Jewel moves into the new center and sterilizes the old location.

Appellants' Br. at 41. Plaintiffs have failed to connect Daly's actions with Jewel's actions, and neither set of actions standing alone or in tandem, is evidence for inferring a conspiracy.

The evidence of record fails to show that, if the case were submitted to a trier of fact, there would be sufficient evidence to justify a judgment for the plaintiffs. Although, at the summary judgment stage, we must evaluate the record so as to give the nonmoving party the benefit of the doubt on all reasonable inferences that may be drawn from that record, we are not permitted to allow a case built on a metaphysical doubt to go to the jury. *Matsushita,* 475 U.S. at 586-87. Here the plaintiffs' case is built on a metaphysical doubt on a metaphysical doubt. There is simply no evidence that precludes the possibility of independent action. *Id.* at 597 n.21. In this context, the absence of that evidence deprives the plaintiffs of a reasonable case that would support a jury verdict. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000-01 (3d Cir. 1994), *cert. denied,* 115 S. Ct. 1691 (1995); *see Eastman Kodak,* 504 U.S. at 468-77.

B. *The Malicious Prosecution Claim*

In February 1990, Mr. Serfecz learned that Jewel was negotiating a sublease with United Skates, who wished to operate a roller skating rink on the premises. Mr. Serfecz wrote Jewel and explained his opposition to the sublease. He believed that, under the terms of the lease, Jewel could not sublease without prior written consent to any tenant whose operation would cause an increase in insurance rates. Jewel responded by stating that it believed that it had the right to sublet the premises

as long as the proposed sublease was for a lawful purpose. It offered to reimburse Mr. Serfecz for any increase in the insurance premium. Mr. Serfecz changed the locks to the premises and Jewel brought a declaratory judgment action against Mr. Serfecz in state court regarding its right to sublease to United Skates. The trial court granted Mr. Serfecz's motion for a directed verdict, and the Illinois appellate court affirmed. *Jewel Cos. v. Serfecz*, 641 N.E.2d 22 (Ill. App. Ct. 1991). On appeal before this court, plaintiffs maintain that the suit was brought solely for the purpose of harassment, intimidation, and interference with the redevelopment of Grove Mall, and they charged Jewel with malicious prosecution.

The Illinois courts have long disfavored actions for malicious prosecution and have sought to encourage a policy of open access to the courts. *Levin v. King*, 648 N.E.2d 1108, 1110 (Ill. App. Ct. 1995); *Keefe v. Aluminum Co. of Am.*, 519 N.E.2d 955, 956 (Ill. App. Ct. 1988). In order to establish malicious prosecution, a claimant must show that: (1) the action was terminated in plaintiff's favor; (2) the action was brought maliciously and without probable cause; and (3) the plaintiff suffered "special injury" or special damage beyond the usual expense, time or annoyance in defending a lawsuit. *Levin*, 648 N.E.2d at 1110; *Keefe*, 519 N.E.2d at 956. The district court determined that the plaintiffs were able to show that the declaratory judgment action was terminated in their favor. It also concluded that they had provided sufficient evidence to create a factual dispute as to whether the action was brought maliciously and without probable cause. However, according to the court, they were unable to show special injury. We agree.

Under Illinois common law, special injury is usually "identified with an arrest or seizure of property or some

constructive taking or interference with the person or property." *Levin*, 648 N.E.2d at 1110. "[A] showing of interference with property 'is satisfied only if a court issues a provisional remedy such as attachment, an order of arrest or an injunction.' "[10] *Equity Assocs., Inc. v. Village of Northbrook*, 524 N.E.2d 1119, 1124 (Ill. App. Ct. 1988) (*quoting Tedeschi v. Smith, Barney, Harris, Upsham & Co.*, 548 F. Supp. 1172, 1174 (S.D.N.Y. 1982), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied*, 474 U.S. 850 (1985)). In Illinois, the court's focus rests upon the peculiar effect of the suit upon plaintiff's right to use the property; special injury in civil cases will not be found unless the injuries emanate directly from the impact of the issues allegedly wrongfully litigated. *Compare Bank of Lyons v. Schultz*, 399 N.E.2d 1286 (Ill. 1980) (holding that injunction restraining distribution of life insurance proceeds for more than nine years to widowed beneficiary sufficient interference with property to satisfy special injury requirement) *and Norin v. Scheldt Mfg. Co.*, 130 N.E. 791 (Ill. 1921) (concluding that prosecution of involuntary bankruptcy created basis for malicious prosecution claim because of the unusual and far reaching impact of a bankruptcy action on property rights) *with Keefe*, 519 N.E.2d at 957 (determining that public record of unsatisfied judgment and impairment of credit rating as a result of pending litigation did not satisfy special injury requirement). The injuries that plaintiffs allege are lost rental payments and the devaluation and inability to redevelop Grove Mall. These allegations of damages are insufficient to satisfy the special injury requirement. Allegations of loss of potential tenants, of institutional lending

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10. Plaintiffs argue that the temporary restraining order issued by the trial court created a special injury identical to the issuance of a preliminary injunction barring a plaintiff from use of her property. We disagree. The temporary restraining order was issued after Serfecz changed the locks and simply gave Jewel, the legal tenant, access to and control of its leased premises.

commitments, and of the earnings and appreciation of a building complex are inadequate to satisfy the special injury requirement. *See Equity Assocs., Inc.*, 534 N.E.2d at 1122.

C. *The Breach of Lease Claim*

Plaintiffs also allege that Jewel has breached paragraph 28 of the lease by using the premises solely for the purpose of keeping the anchor space dark. Paragraph 28 provides that the "lessee shall use the leased premise only for operation of a grocery supermarket." The plaintiffs state that "the gist of [our] argument concerning paragraph 28 is that Jewel is using the premises to stifle competition and not to operate a grocery supermarket." Reply Br. at 21. This argument is, at best, an extension of plaintiffs' argument that Jewel has breached the lease by using the premises for an unlawful purpose, a claim which is still pending in the district court.[11]

Paragraph 28 is a typical use-restriction provision delineating the permissible uses of the leased premises. We do

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11. In the district court, plaintiffs claimed that Jewel breached paragraph 1 of the lease by using the premise to restrain trade and monopolize the retail grocery business. Paragraph 1 of the Jewel lease provides:

> Lessee shall not use the demised premise for any unlawful purpose nor shall it commit waste. It shall comply with all lawful requirements of the local Board of Health, Police and Fire Departments, and state and federal authorities, respecting the manner in which it uses the leased premises.

R.22, Ex.7 at 1. The district court found that use of the premises in furtherance of a § 2 antitrust violation could constitute a breach of the lease and denied defendant's motion for summary judgment as to this claim.

not believe paragraph 28 supports plaintiff's claim that a use-restriction as to the sale of groceries restricts the defendants from leaving the store vacant. Allowing a store to remain vacant is different from opening a hardware or music store on the leased premises, and we believe it is the latter and not the former that paragraph 28 was meant to address.

Conclusion

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED

Appendix A

CUDAHY, *Circuit Judge*, dissenting. This is a difficult case. Much of the relevant case law and the various guides to standing it contains may be read at least superficially to support the result reached by the majority. The alleged injury here is "indirect" in the sense that Serfecz is not a competitor in the retail grocery market nor, obviously, a consumer. Yet the economic reality is that Serfecz has suffered a more calculable and a more substantial injury from Jewel's allegedly anti-competitive conduct than would a plaintiff whose injuries were in theory direct. In fact, if Serfecz's suit fails for lack of standing, there is not much realistic hope of anyone else's taking up the cudgels. This is certainly a relevant, though not necessarily dispositive, factor in the analysis.

It is unlikely that a grocery store competitor (or here *potential* competitor) of Jewel would challenge Jewel's conduct in retaining its hold on its abandoned store. With all the thousands of possible locations available in the Chicago area, it is doubtful that a competitor would undertake an expensive and prolonged lawsuit to gain entry to one of them — and one already subject to Jewel's strong competition, at that. This would be true even if, as is alleged here, Jewel played dog in the manger with other store locations as well.

A customer would be even more unlikely to sue since her damages would be slight and very difficult to prove. On the other hand, Serfecz has lost his anchor tenant and been precluded from getting another. The consequent decline in the value of his shopping center involves not only a substantial loss but one more easily calculable than losses to potential competitors or to consumers. Serfecz may be in theory only a supplier to a potential competitor but his evident loss is much more likely to be the basis of a lawsuit than the putative loss of one "directly" injured.

Appendix A

Judge Grady, whose summary judgment decision we review here, expressed doubt and frustration about the result to which he felt driven by the cases. He expressed the view that competitors of Jewel or its consumers would not in fact be in a position to challenge the alleged anti-competitive conduct here. Judge Grady expressed his concerns as follows:

> Is there an identifiable class of potential plaintiffs who might be better suited than Serfecz by virtue of their more direct injuries to bring suit and whose self-interest would motivate them to do so? In the case most directly on point, *Southaven*, the Sixth Circuit rather summarily concluded that consumers or other market participants would be more appropriate plaintiffs to seek a remedy for restraint of trade or monopolization in the grocery market. While, in theory, we agree with the Sixth Circuit, we lack that court's confidence that either of these two groups of potential plaintiffs would be sufficiently motivated to actually bring suit. We suggest that Serfecz might be correct that a competing grocery store not yet operating in the area, such as Dominicks, would be more likely to forgo a location than to incur the high start-up costs of litigation. Indeed, according to plaintiffs, the fact is that no competitor has filed an antitrust lawsuit against Jewel although there is evidence that Jewel has been restricting locations throughout Illinois for the last ten years. As regards a consumer suit, the degree

> of harm suffered by an individual consumer as a result of reduced competition in the grocery market in Elk Grove Village would probably not be sufficiently great to give him incentive to sue. Thus, we fear that there is a high risk that a significant antitrust violation will go unremedied if we do not grant plaintiffs standing to sue in this case. Mem. Op. at pp. 19-20.

Admittedly, the prospect of there being no enforcement of the antitrust laws here if the present suit fails is not dispositive, but it should weigh significantly in the scales "An antitrust standing determination is ultimately a product of the particularities of each case." *Sanner v. Board of Trade*, No. 94-2139 & No. 94-2152, slip op. at 15 (7th Cir., Aug. 7, 1995). "*McCready* and *Associated General Contractors* exemplify that innumerable elements, including proximity and directness, constitute proper areas of inquiry" in determining antitrust standing. *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983). This case is a far cry from *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), where the injury to the plaintiff union was far more speculative than any injury to landowners (customers) and other contractors (competitors) to whom coercion was applied in that case. Certainly these landowners and other contractors could readily have sued had they in fact been injured. That is not the case here.

I believe that this case is distinguishable from much of the precedent because Jewel as an anchor tenant in a shopping center occupies a dual role. It is no doubt a competitor in the retail grocery market. But it (or its replacement if one is permitted) is

also an essential ingredient of a successful shopping center. Jewel's refusal to permit competition is therefore in and of itself a fatal blow to the viability of the center. The issue is whether Serfecz has "antitrust" standing and I am persuaded that he does in these limited circumstances—even though the injury to him is indirect. *Cf. Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994).

Southaven Land Co., cited by the majority, is factually on point but reaches a result opposite to the one I advocate here. However, that case conceded that, "a finding or concession that [the lessor] is not a direct participant in the relevant market is not dispositive of the § 4 'standing' issue." 715 F.2d at 1086. The Sixth Circuit went on to conclude that the injury to the lessor of grocery store facilities was not "inextricably intertwined" with the injury to the retail grocery market so as to make the analysis in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), controlling. I think the analysis of the Sixth Circuit up to, but not including, its final step is correct. I disagree, however, on the question whether the injury to the retail grocery market here is inextricably intertwined with the injury to Serfecz and the Grove Mall. If, as is alleged, Jewel retained its lease on the empty store in the Grove Mall with intent to monopolize the retail grocery business in the area, it is difficult to see how damage to the Mall would not have been foreseeable and inevitable. Therefore, I believe that the one injury is inextricably intertwined with the other. Injury to the Mall is surely more calculable than injury to a potential competitor not yet present in the market. *Cf. Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967).

In the case before us, Judge Grady found:

> Without elaborating in any detail, we believe

> that plaintiffs in the present case have presented enough evidence for the trier of fact to find a causal connection between the absence of a grocery store anchor tenant and the slow demise of the Grove Mall. There is also evidence that Jewel acted deliberately to prevent a competitor from occupying the space in the Mall. Mem. Op. at 7.

It is also true that there is no problem of duplicative recovery here because Serfecz presumably could recover the loss in value of his shopping center due to his inability to redevelop it, as well as lost rental income. A potential competitor, on the other hand, could recover the unrelated amount of lost profits, and a consumer could recover damages due to higher prices. On balance, therefore, I believe that Serfecz has antitrust standing and should be allowed to proceed.

I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 4171

JOSEPH SERFECZ and FIRST CHICAGO TRUST COMPANY, Trustee of Trust No. 684,

Plaintiffs,

v.

JEWEL FOOD STORES, INC., et. al.,

Defendants.

MEMORANDUM OPINION

This case comes before the court on the motion of defendants Jewel Food Stores, Inc., and American Stores Properties, Inc., for summary judgment. For the reasons discussed below, we grant the motion for summary judgment on the antitrust and malicious prosecution claims in Counts I, II, and III. Summary judgment on the breach of lease claim in Count IV is granted in part and denied in part.

Appendix B

BACKGROUND

Plaintiff First Chicago Trust Company of Illinois, as trustee, is the title holder of the Grove Mall Shopping Center ("Grove Mall") in Elk Grove Village. Plaintiff Joseph Serfecz is the beneficial owner of this trust. In 1963 defendant Jewel Food Stores, Inc. ("Jewel") entered into a lease with plaintiffs' predecessor-in-interest for retail space in the Grove Mall in which to operate a grocery store. When Serfecz purchased the Grove Mall in 1977, he assumed all existing leases, including the Jewel lease. Jewel's original lease ran until 1986 and provided Jewel three five-year options to renew. Jewel has exercised two of those options. Thus, its current lease runs until 1996, and it has one remaining option to renew until 2001. Defendant American Stores Properties, Inc. ("American Stores") is the real estate management and development arm of American Stores Company and its subsidiaries, of which Jewel is one, and is engaged in managing properties owned or rented by Jewel.

Up until October 1987, Jewel owned and operated a grocery store in its leased space in the Grove Mall and was the mall's anchor tenant. In October of 1987, Jewel vacated the premises and moved its grocery operation to a building in the newly constructed Elk Crossing Mall, directly across the street from the Grove Mall. Since that time, the space formerly occupied by Jewel at the Grove Mall has remained vacant, and Jewel has refused to give up its leasehold interest in the premises, thereby preventing Serfecz from securing another grocery store as an anchor tenant. Since vacating its space, Jewel has continued to pay rent and has exercised its second option to renew the lease. Jewel proposed to sublet the space to defendant United Skates of America ("United Skates"), for use as a roller rink and games

arcade. Serfecz objected to the proposed sublease because he considered United Skates to be an "obnoxious" tenant and because he was concerned that occupancy by United Skates would result in higher insurance rates. In February 1990, Jewel filed suit seeking a declaratory judgment regarding its right to sublet to United Skates. The trial court ruled against Jewel, and the appellate court affirmed.

Plaintiffs bring suit against Jewel, American Stores, and United Skates, and against the developers, owners and operators of the Elk Crossing Mall (collectively referred to herein as the "Elk Crossing defendants"), alleging that the defendants conspired to keep the Jewel space at the Grove Mall vacant, to prevent a major anchor tenant from taking over the space, to prevent Serfecz from re-developing the mall, to coerce Serfecz's other tenants to leave the Grove Mall and move across the street to the Elk Crossing Mall, and to otherwise devalue and destroy the Grove Mall. Plaintiffs maintain that this conspiracy is part of an overall marketing strategy of restricting the use of property in order to keep out competitors. In support of this claim, plaintiffs offer evidence of other similar restrictive lease arrangements throughout Illinois involving Jewel.

In Counts I and II of their complaint, plaintiffs maintain that defendants have violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, by conspiring to restrain trade by eliminating competition in the grocery store and retail shopping center markets, and attempting to monopolize the grocery store business, the sale and development of commercial real estate, and the business of operating a retail shopping center within the relevant geographic market. Plaintiffs also bring state law claims in Count III for malicious prosecution based on the

Appendix B

February 1990 declaratory judgment suit brought by Jewel,[1] and in Count IV for breach of lease. Before the court is the motion for summary judgment of defendants Jewel and American Stores.[2]

DISCUSSION

I. Antitrust Standing

Defendants move for summary judgment on Counts I and II, claiming that plaintiffs lack standing to bring antitrust claims against Jewel. Private civil actions to enforce the Sherman Act are allowed under Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." However, despite this seemingly broad grant of authority to sue, the Supreme Court has emphasized that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California v. California State Counsel of Carpenters*, 459 U.S. 519, 534 (1983) (internal quotation marks and citation omitted). Thus, even though a plaintiff might suffer

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1. Defendants correctly point out that in our previous opinion of March 26, 1993, we ruled that no other litigation could serve as a basis for plaintiffs' charge of malicious prosecution. Thus, we consider the malicious prosecution claim only insofar as it is based on the February 1990 declaratory judgment action.

2. Also pending is the motion of the Elk Crossing defendants for summary judgment. However, due to repeated extensions in the briefing schedule, that motion is not yet fully briefed and thus is not considered by the court at this time.

sufficient harm to satisfy the constitutional standing requirement of injury in fact, "the court must make the further determination whether the plaintiff is a proper party to bring a private antitrust action." *Id.* at 535 n. 31. Even when an antitrust violation under the Sherman Act has clearly occurred, Section 4 of the Clayton Act allows only certain private parties to bring suit on the basis of that violation.[3] The Supreme Court recognized that given "the infinite variety of claims" that might arise under Section 4, it would be "virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 536. Thus, the Court rejected rigid, one-dimensional tests for standing such as the "target area," "zone of interests," or "directness of injury" tests. *Southaven Land Co. v. Malone & Hyde*, 715 F.2d 1079, 1085 (6th Cir. 1983) (citing *Associated General Contractors*, 459 U.S. at 536 n.33). The Court instead identified various factors that should guide a case-by-case inquiry into whether a particular party has standing to seek an antitrust remedy. *Id.* (citing *Associated General Contractors*, 459 U.S. at 537). It is important to note at the outset that no single factor is decisive; rather, the court must balance all of the factors.

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3. As the Seventh Circuit explained in *Indiana Grocery v. Super Valu Stores*, 864 F.2d 1409 (7th Cir. 1989), "While sections 1 and 2 of the Sherman Act focus on competitive conditions in the marketplace as a whole, . . . section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be an 'antitrust injury.' " *Id.* at 1419 (emphasis in original). The Seventh Circuit elaborated further on this important distinction: "It is tempting when performing an antitrust injury analysis to look first at the substantive antitrust provision the defendant allegedly has violated, to note next the harmful effects on competition the substantive provision is designed to prevent, to note further that some of those harmful effects might fall on parties such as the plaintiff, and to conclude, therefore, that the plaintiff should have standing to vindicate the substantive antitrust provision." Such an approach, according to the Seventh Circuit, "stand[s] the antitrust injury inquiry on its head." *Id.* at 1419 n. 6.

R.C. Dick Geothermal v. Thermogenics, 890 F.2d 139, 146 (9th Cir. 1989). *See also, Los Angeles Memorial Coliseum v. N.F.L.*, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) ("Most cases will find some factors tending in favor of standing . . . and some against . . . and a court may finding standing if the balance of factors so instructs.").

The antitrust standing factors outlined by the Supreme Court in *Associated General Contractors* have been described and interpreted in various ways by the different circuit courts. However, as our colleague noted in *American Agriculture Movement v. Board of Trade*, 848 F. Supp. 814, 823 (N.D. Ill. 1994) (Marovich, J.), "[t]he differences between the expressions of the *Associated General Contractors* factors are ones of form rather than substance." Thus we refer to cases from several different circuits in our effort to better understand and apply the guidelines established in *Associated General Contractors*.

The first *Associated General Contractors* factor to be considered is whether there is a causal connection between the antitrust violation and the harm to the plaintiff, and whether the defendant intended to cause that harm. 459 U.S. at 537. Without elaborating in any detail, we believe that plaintiffs in the present case have presented enough evidence for the trier of fact to find a causal connection between the absence of a grocery store anchor tenant and the slow demise of the Grove Mall. There is also evidence that Jewel acted deliberately to prevent a competitor from occupying the space in the mall.

Another factor considered important by the Supreme Court in *Associated General Contractors* is the nature of the plaintiff's injury. The Court considered whether the injury was " 'of a type that Congress sought to redress in providing a private remedy for violations of Antitrust laws.' " *Associated General Contractors*,

459 U.S. at 537 (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483 (1982), bearing in mind the central policy underlying the Sherman Act of "assur[ing] *customers* the benefits of price competition," and "protecting the economic freedom of *participants* in the relevant market." *Associated General Contractors*, 459 U.S. at 538 (emphasis added).

In *Southaven Land Co. v. Malone & Hyde*, 715 F.2d 1079 (6th Cir. 1983), a case strikingly similar to the one now before us, the Sixth Circuit considered the nature of the injury when evaluating the standing of a lessor of retail commercial space to challenge the alleged antitrust behavior of an owner and operator of retail grocery stores. Defendant leased premises from plaintiff Southaven for the purpose of operating a retail grocery business. Defendant then executed a series of subleases with successive third parties to operate grocery stores at the Southaven location. At the time defendant entered into its lease with plaintiff and thereafter, defendant also owned and operated other retail grocery outlets in the same geographical area. The last of defendant's successive subtenants went bankrupt, and defendant did not arrange for a replacement grocery store. Following the business demise of the last sublessor, plaintiff sought to negotiate a cancellation of defendant's lease so that plaintiff could replace defendant with a viable grocery operator, but defendant refused to execute the proposed cancellation agreement or otherwise surrender the premises, and removed its equipment, thereby rendering the premises unfit for use as a grocery. Like plaintiff Serfecz in the present case, Southaven claimed that defendant intended to destroy the site as a location for the operation of a retail grocery outlet and to monopolize the grocery store market in the area. *Id.* at 1081.

Following the Supreme Court's guidance in *Associated General Contractors*, the Sixth Circuit in *Southaven* analyzed

the nature of the plaintiff's injury by examining the status of the plaintiff in relationship to the relevant market. *Id.* at 1085-86. The court defined the relevant market as the retail grocery industry in the geographical area of the Southaven property, *id.* at 1086, and found that Southaven, as a lessor of retail commercial premises to grocery stores, did not qualify as a "competitor, purchaser, consumer or other economic actor in the grocery industry," even though its former and prospective grocery store tenants did compete in that market. *Id.* at 1081, 1086.

The Sixth Circuit noted, however, that under *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), a plaintiff who is not, himself, a direct "participant" in the market, still may have standing if his injury is " 'inextricably intertwined' with the injury sought to be inflicted upon the relevant market or participants therein." *Southaven*, 715 F.2d at 1086 (citing *McCready*, 457 U.S. at 483). In *McCready*, plaintiff, a psychotherapy patient, challenged her health insurance provider's practice of covering only the costs of seeing a psychiatrist, not the expenses of a psychologist. The Supreme Court found that plaintiff's injury as a consumer of psychotherapeutic services was "inextricably intertwined" with the injury sought to be inflicted on the suppliers of psychological services, and thus, granted plaintiff standing to complain that Blue Shield violated the antitrust laws by acting to restrain competition in the market for psychotherapeutic services. *McCready*, 457 U.S. at 483-84.

The Sixth Circuit applied the analysis of *McCready* to the facts in *Southaven*, in order to determine whether the plaintiff lessor's injury was "inextricably intertwined" with the injury to the grocery market. The court noted that the primary class of persons injured by an antitrust violation are those adversely

affected as a result of controlled prices or an exclusion of competition. *Southaven*, 715 F.2d at 1087 n. 10. Because Southaven was not alleged to be a "member of a class of 'consumers' of grocery products or a class otherwise manipulated or utilized by [defendant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets," the Sixth Circuit concluded that the injuries suffered by the plaintiff as an owner and lessor of retail space were not sufficiently intertwined with the injuries to the grocery market to give plaintiff standing under the rule of *McCready*. *Id.* at 1086. The Sixth Circuit further explained: "Although Southaven's injury may be a tangental [sic] by-product of [defendant's] averred monopolistic conduct, such injury is not *inextricably* intertwined to any injury inflicted upon the relevant market. . . . Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws." *Id.* at 1086-87 (emphasis in original).

In another case of warring grocery stores, the Southern District of New York applied the rules of *Associated General Contractors*, *McCready*, and *Southaven*, to evaluate the standing of the owner and developer of a shopping mall to complain that the defendant supermarkets conspired to prevent a grocery store from opening in its mall by filing state court lawsuits and attending local planing commission hearings to prevent the issuance of necessary permits. *Rosenberg v. Cleary, Gottlieb*, 598 F. Supp. 642 (S.D.N.Y. 1984). The court dismissed the antitrust counts because the alleged violation related to "the retail grocery business," and plaintiff, as a mall developer and owner, was not a direct participant in that market. *Id.* at 645. Rather, plaintiff's injuries related to its role as a participant in the construction and real estate market, and as such, were only tangentially related to the alleged antitrust violations and resulting lack of competition in the grocery market. *Id.* Thus, the

court found plaintiff to be an "inappropriate" antitrust complainant. *Id.*

We turn now to examine the case law in our own circuit regarding the nature of the injury aspect of the standing analysis. A leading Seventh Circuit case on the issue is *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Assoc.*, 830 F.2d 1374 (7th Cir. 1987). In *Southwest Suburban*, the Seventh Circuit evaluated the standing of a trade association that provided listing services to real estate brokerage firms to challenge the defendant neighborhood planning association and defendant brokers' purported antitrust violations. The complaint alleged that the defendants conspired to boycott the plaintiff's listing service, and encouraged consumers to boycott the listing service as well. *Id.* at 1379. As a result of the conspiracy, the plaintiff was no longer able to provide a comprehensive listing of properties to its subscribers.

Like the Sixth Circuit in *Southaven*, the Seventh Circuit's inquiry into the nature of the plaintiff's injury in *Southwest Suburban* focused on plaintiff's status in relationship to the relevant market. The *Southwest Suburban* court concluded that the plaintiff trade association lacked standing to sue for antitrust violations because it was neither a supplier nor a purchaser in the market for real estate brokerage services. *Id.* at 1379. Rather, the plaintiff acted as a supplier of a product, its list, to brokers. Noting the general rule in the Seventh Circuit that "suppliers of an injured customer may not seek recovery under the antitrust laws because their injuries are too 'indirect, secondary, or remote,' " *id.* (citing *In re Industrial Gas Litigation*, 681 F.2d 514, 519-20 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983)), the court held that "any injury which [plaintiff] sustained by virtue of defendants' alleged boycott of the [listing service] was

only indirectly related and incidental to the anticompetitive scheme, the intent and effect of which was . . . to gain control of the real estate brokerage services market." *Id.*

The paramount status of the consumer in antitrust law is made clear by other cases in the Seventh Circuit applying and interpreting the nature of the injury factor. The court closely scrutinizes whether the interests of the plaintiff are in line with the interests of the consumers: " 'When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust.' " *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1564 (7th Cir. 1991) (citation omitted). As the Seventh Circuit explained in *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1338 (7th Cir. 1986), even a competitor in the market does not necessarily share the consumer's interest (and the antitrust laws' interest) in the protection and promotion of competition: "Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition." *Id.* at 1338 (emphasis in original). After all, the antitrust laws were designed to protect competition, not individual competitors. *Id.* (citing *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977)).

In *Garot Anderson Marketing v. Blue Cross*, 772 F. Supp. 1054, 1062 (N.D. Ill. 1990), a colleague in this district applied the antitrust standing rules established in *McCready* and *Southwest Suburban* to determine whether the plaintiff insurance agents and agencies who sold the insurance products of one of the defendant insurance companies had standing to challenge the actions of the defendants in allegedly conspiring not to compete with each other for a particular business. Plaintiffs alleged that they were injured by the loss of sales

commissions resulting from the termination of a certain insurance product. The court concluded that the rule of *Southwest Suburban* did not bar the plaintiffs' suit. The court explained that "the plaintiff need not be the target of the alleged conduct. . . . It is sufficient that the plaintiff participated in some relevant way in the part of the market endangered by the alleged antitrust violation." *Id.* at 1062. Apparently, the court found that the plaintiffs' status as sellers of insurance qualified them as "participants" in the same market as the defendant suppliers of insurance.

Underlying the courts' efforts in *Associated General Contractors*, *McCready*, and their progeny, to limit antitrust standing to marketplace participants is the awareness that without such limits, the courts would be overwhelmed with duplicative antitrust litigation, and the knowledge that Congress did not intend the antitrust laws to provide a catch-all remedy for every injury remotely linked to an antitrust violation. The Supreme Court in *Associated General Contractors* noted the "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543. As the Court explained in *McCready*,

> [a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 [the Clayton Act] there is a point beyond which the wrongdoer should not be held liable. . . . It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for [his] injury.

457 U.S. at 476-77 (internal quotation marks and citation omitted).[4]

We turn now to the arguments in this case regarding the nature of Serfecz's injury as reflected by his status in relationship to the relevant marketplace, and the connection between his injury and the injury to that market. Defining the relevant market as the retail grocery industry, we, like the Sixth Circuit in *Southaven*, find that Serfecz, as a lessor of retail premises, does not qualify as a competitor or consumer in this industry, even though his former and prospective future tenants compete in that market. The case law in our own circuit supports this conclusion. In *Southwest Suburban*, 830 F.2d 1374 (7th Cir. 1987), the Seventh Circuit concluded that the plaintiff trade association, which supplied a real estate listing service to brokers, could not sue certain brokers for antitrust violations in the brokerage market because it was neither a direct supplier nor a purchaser in the relevant market. Similarly, Serfecz is neither a direct supplier nor purchaser in the grocery market. Rather, Serfecz, like the

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4. Fear of opening the floodgates was obviously a motivating factor behind the Sixth Circuit's denial of standing in *Southaven*. The Sixth Circuit worried that if it were to permit the shopping center landlord to sue the vacating grocery store for damages predicated upon diminished lease revenue resulting from reduced consumer activity at his shopping center, it would also have to grant standing to the other lessees as well, predicated upon their diminished sales. *Southaven*, 715 F.2d at 1088 n. 12. In *Alpha Shoe Service v. Fleming Companies*, 849 F.2d 352 (8th Cir. 1988), *cert. denied*, 488 U.S. 942 (1988), the Eighth Circuit rejected just such a suit brought by shopping center tenants against a grocery store anchor tenant who vacated its space and left it empty for an extended period of time. The court declined to adopt plaintiffs' broad characterization of the relevant market as "the attraction of consumers," and found that the tenants lacked standing because they "were not competitors, participants, or consumers in the relevant market." *Id.* at 354. The court rejected plaintiffs' broad definition of the market for fear of "expand[ing] the scope of the private antitrust action far beyond its intended bounds." *Id.*

listing service, can be thought of as a supplier to the grocery stores which do directly compete in the market: he supplies retail space. Under the general rule stated in *Southwest Suburban*, the injuries of suppliers such as Serfecz are too indirect to support standing.

Serfecz argues that under *McCready* he has standing to sue because even though he is not a direct market participant, his injury is "inextricably intertwined" with the injury to the grocery market. Serfecz offers a creative argument regarding the close business tie that exists between a shopping mall developer and a grocery store anchor tenant; however, according to the case law, this does not qualify him as inextricably intertwined with the grocery market under the rule of *McCready*. As we explained above, the plaintiff in *McCready*, while not herself a competitor in the market for psychotherapeutic services, was actually a *consumer* of such services.

Plaintiffs also argue that Serfecz has standing because Jewel's actions were "aimed squarely at Serfecz and the Grove Mall, and *not* directly at a competitor." They cite *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967), as a source for their reasoning. Plaintiffs' memorandum in Support of its Response to the Motion for Summary Judgment ("Plaintiffs' Response") at 5-6. However, the "target area" test for standing employed by the Ninth Circuit in *Hoopes* was rejected by the Supreme Court in *Associated General Contractors*, 459 U.S. at 536 n. 33.[5]

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5. Responding to the emphasis in the case law and defendants' memorandum in support of their motion for summary judgment on the market status of an antitrust plaintiff, Serfecz also resorts to the argument that he is in fact a consumer in the market because he shops for groceries in Elk Grove Village, and that, in order to sustain his shopping center, he is "willing" to

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Appendix B

In its desire to keep antitrust litigation within judicially manageable bounds and avoid duplicative suits, without forcing antitrust violations to go unchallenged altogether, the Supreme Court in *Associated General Contractors* also considered whether a party more directly injured by the violations might file suit as another factor relevant to the standing inquiry. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." 459 U.S. at 542. If more direct victims exist, denial of standing to those only tangentially injured "is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* Applying a similar rationale in a case which foreshadowed the Supreme Court's reasoning in *Associated General Contractors*, the Seventh Circuit emphasized the importance of limiting antitrust standing to those plaintiffs able to most efficiently vindicate the antitrust laws. *In re Industrial Gas Litigation*, 681 F.2d 514, 516 & 520 (7th Cir. 1982). Thus, the standing inquiry focuses "not only on whether there has been an 'antitrust injury,' but also on whether the particular plaintiff is the appropriate antitrust enforcer." *Id.* at 520. Like the Supreme Court in *Associated General Contractors*, the Seventh Circuit strove to strike a balance between the interest in "deterrence through private antitrust enforcement and redress for injury," on the one

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become a competitor in the market by opening his own grocery store in the Grove Mall. Plaintiffs' Response at 7. However, the antitrust allegations in the complaint frame this case as a suit to remedy the injuries suffered by Serfecz as the owner of a competing shopping mall, *not* the injuries he may have suffered as a grocery consumer or prospective grocery store competitor. Thus, we reject Serfecz's last ditch efforts to obtain standing by re-casting his case in a manner unsupported by the complaint.

hand, and "the avoidance of excessive treble damages litigation," on the other hand. *Id.* The court concluded that the proper compromise could best be achieved by granting standing "only to those who, as consumers or competitors, suffer immediate injuries . . . while excluding person whose injuries were more indirectly caused by the antitrust conduct." *Id.* The court believed that "this select class of plaintiffs" would be able to "impose the deterrent sting of treble damages at the smallest cost of enforcement." *Id.* The Seventh Circuit thus reduced this aspect of the inquiry to a basic costs/benefits analysis.

Under the rationale articulated in *Associated General Contractors* and *Industrial Gas*, the courts search for the most directly injured — and thus, presumably, the best — plaintiff. Accordingly, the Seventh Circuit in *Southwest Suburban* concluded that brokers who subscribed to plaintiff's listing service and whom might have been hurt by the boycott of the listing service would serve as more appropriate plaintiffs than the listing service itself, because their injuries were more direct. 830 F.2d at 1379-80. The Ninth Circuit in *R.C. Dick Geothermal Corp. v. Thermogenics*, 890 F.2d 139 (9th Cir. 1989), considered the standing of the landlord of one of the defendants to complain that the defendants' conspiracy to restrain trade by slowing production injured the landlord by reducing the royalties it received under the lease. The Ninth Circuit denied standing because the landlord, although injured by his decreased royalties revenue, was not the most directly injured potential plaintiff; rather, the court concluded that other sellers in the market would be "in a far better position to champion the public interest in vigorous antitrust law enforcement." *Id.* at 148. Likewise, in *Rosenberg*, the Southern District of New York observed that both supermarket consumers and the plaintiff shopping mall developer's prospective grocery store tenant would be more

suitable complainants regarding the defendant supermarket's alleged actions in restraint of trade in the grocery store market. And, finally, in *Southaven*, the Sixth Circuit briefly noted that consumers and other market participants would be more direct victims, and thus, by implication, better plaintiffs.

We now consider whether a similar rationale can be applied to the present case: Is there an identifiable class of potential plaintiffs who might be better suited than Serfecz by virtue of their more direct injuries to bring suit and whose self-interest would motivate them to do so? In the case most directly on point, *Southaven*, the Sixth Circuit rather summarily concluded that consumers or other market participants would be more appropriate plaintiffs to seek a remedy for restraint of trade or monopolization in the grocery market. While, in theory, we agree with the Sixth Circuit, we lack that court's confidence that either of these two groups of potential plaintiffs would be sufficiently motivated to actually bring suit. We suspect that Serfecz might be correct that a competing grocery store not yet operating in the area, such as Dominicks, would be more likely to forgo a location than to incur the high start-up costs of litigation. Indeed, according to plaintiffs, the fact is that no competitor has filed an antitrust lawsuit against Jewel although there is evidence that Jewel has been restricting locations throughout Illinois for the last ten years. As regards a consumer suit, the degree of harm suffered by an individual consumer as a result of reduced competition in the grocery market in Elk Grove Village would probably not be sufficiently great to give him incentive to sue. Thus, we fear that there is a high risk that a significant antitrust violation will go unremedied if we do not grant plaintiffs standing to sue in this case. However, the case law in the various circuits, including our own, makes it clear that the mere existence of competitors or consumers in the relevant market

who *could* sue is considered a factor in favor of denying standing. Where a more directly injured class of potential plaintiffs exists, we are left with very little leeway to address the likelihood of whether any members of that class would actually bring suit. While the result may be somewhat frustrating in this particular case, it does provide a straightforward rule of law and eliminates the need for us to consider evidence on the speculative question of whether and when a more appropriate plaintiff might sue.

The Supreme Court in *Associated General Contractors* examined the directness of the plaintiff's injury as a factor in the standing analysis not only to prevent excessive and duplicative litigation, but also to avoid highly complicated damage determinations. 459 U.S. at 542-544. As the Sixth Circuit explained in *Southaven*, "indirect injuries may render damages highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages." 715 F.2d at 1087. The Sixth Circuit reviewed the damages sustained by the plaintiff shopping center lessor in *Southaven*, and noted that there had been no breach or failure to perform under the lease; in fact, the defendant grocery store operator had continued to tender rental payments when due even though it was no longer operating at the Southaven location. Rather, the plaintiff complained of its inability to command premium rent from its other lessees (or perhaps to even attract lessees at all) due to the reduced consumer traffic at a shopping center without an operating grocery store. The Sixth Circuit believed that "ascertainment of damages to compensate such injury would necessitate wide ranging speculation, particularly since diminished consumer activity at any given shopping area could result from myriad independent reasons unrelated to the alleged antitrust violation." *Southaven*, 715 F.2d at 1087. Thus, at the heart of the Sixth Circuit's preference for antitrust

plaintiffs with direct injuries, is the difficulty inherent in establishing causation of an indirect injury, which in turn creates difficulty in determining damages. Thus, the existence of a causal connection between the antitrust violation and the harm to the plaintiff is not only an independent factor in the *Associated General Contractors* analysis, *supra* p. 6-7, but also underlies the examination, under *Associated General Contractors*, of the directness of the plaintiff's injury.

In *Greater Rockford Energy & Technology v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1054 (1994), the Seventh Circuit, too, acknowledged the difficulty of proving that the harm suffered by a plaintiff resulted from the alleged antitrust activity. "An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury." *Id.* at 401. Where there was not just one, but numerous intervening economic and market factors which could offer an alternative explanation for plaintiff's injuries, the Seventh Circuit observed that it would be difficult for the plaintiff to prove that the antitrust violations were the cause of the injuries. *Id.* at 402-404.

We turn now to the present case, and consider the difficulties facing Serfecz in attempting to prove that the injuries he suffered resulted from Jewel's alleged antitrust violations. Defendants argue that numerous factors might explain Serfecz's inability to attract either tenants or developers to the Grove Mall, including its aging, dilapidated condition, its poor design, and the presence of a new, more attractive competing mall across the street. Defendants are correct that in light of these possible independent reasons for the decline of the Grove Mall, it may be difficult for Serfecz to prove that his injuries were caused by antitrust

violations. However, as we mentioned when discussing causation as an independent factor in the *Associated General Contractors* analysis, we believe that plaintiffs have cited enough evidence to raise a material issue of fact regarding causation. For example, in a sworn declaration, plaintiffs' retail shopping center expert explained that because of Jewel's actions in continuing to claim a leasehold interest in the premises, commencing various litigation against Serfecz, and attempting to sublet to a roller rink with arcade games, prospective tenants and redevelopers would have no interest in the Grove Mall. Plaintiffs' Exhibits to Plaintiffs' Response, Declaration of Kenneth Leonard. However, there is still room for the kind of concern raised in both *Southaven* and *Greater Rockford Energy & Technology* regarding the difficulties of allocating the damages amongst the "myriad" possible causes.

In summary, applying the factors established by the Supreme Court in *Associated General Contractors*, we find that plaintiffs lack standing to challenge Jewel's antitrust activity in the retail grocery market. We believe that Serfecz has raised a dispute of material fact regarding whether Jewel's alleged antitrust conduct caused his harm. However, we are ultimately persuaded by the Sixth Circuit's reasoning in *Southaven*, as well as that of the Southern District of New York in *Rosenberg*, that plaintiffs' injuries were too indirect to be considered inextricably intertwined with the injury to the relevant marketplace, the retail grocery business, and thus the plaintiffs are not the proper plaintiffs to challenge antitrust activity in that market. The emphasis in our own circuit on the interests of the consumer and the status of a plaintiff in relation to the marketplace persuades us that the approach to the shopping center/grocery store battle taken by the Sixth Circuit in *Southaven* and the Southern District of New York in *Rosenberg*

would be good law here in the Seventh Circuit. Thus, we grant Jewel's motion for summary judgment and dismiss for lack of standing plaintiffs' antitrust claims against both Jewel and American Stores in Counts I and II of the complaint insofar as they pertain to Jewel's alleged antitrust activities in the retail grocery market.[6]

However, plaintiffs' antitrust claims against Jewel are not limited to the grocery business. Plaintiffs also have clearly alleged that Jewel participated in a conspiracy with the Elk Crossing defendants and United Skates to restrain trade and monopolize sales and development in the business of operating a retail shopping center and leasing commercial premises to retail tenants. *See, e.g.*, Complaint at ¶¶ 25, 40, 85, 86. Defendants have offered no dispute regarding the direct injuries suffered by plaintiffs as participants in that market,[7] and thus, we

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6. In arguing the motion for summary judgment brought by Jewel and American Stores, the parties have made no attempt to distinguish the situation of Jewel from that of its property manager and sister company, American Stores. Apparently, the parties view the role of these two defendants as identical. Therefore, even though very little information has been provided to the court regarding American Stores, as distinguished from Jewel, we assume that its responsibility for the alleged antitrust activities is the same of that of Jewel, and we treat it identically for purposes of this motion for summary judgment.

7. Indeed, defendants, themselves, at one point acknowledge that Jewel might be found liable for antitrust violations in the market for retail shopping centers on a conspiracy theory. *See* Defendants' Memorandum in Support of Motion for Summary Judgment ("Defendants' Memorandum") at 12 n.1. ("Because Jewel does not compete in the market for retail shopping centers . . . Jewel cannot be found to have monopolized . . . this market. . . . Jewel can only be found liable on a monopolization theory in this market by virtue of a conspiracy.")

conclude that plaintiffs have standing to challenge Jewel's actions in relation to the market for operation of retail shopping centers. However, our determination that plaintiffs have standing to asset limited antitrust claims against Jewel does not end our review of the motion for summary judgment. The motion raises substantive challenges to the antitrust claims which go beyond the question of standing. These challenges will be discussed *infra* in Part II of this opinion.

II. The Merits of Plaintiffs' Claims of Antitrust Violations

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.' " *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. *See Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986). Summary judgement will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Defendants argue that even if plaintiffs have standing to bring antitrust claims against Jewel, plaintiffs have failed to make a factual showing sufficient to establish the essential

elements of those claims. In order to establish a violation of Section 1 of the Sherman Act, plaintiffs must establish the existence of a contract, combination or conspiracy intended to restrain competition. *Greater Rockford Energy & Technology,* 998 F.2d at 396. Plaintiffs claim that Jewel and American Stores participated in a conspiracy to restrain trade in the retail shopping center market in violation of Section 1 by helping to destroy the viability of the Grove Mall. In furtherance of that conspiracy, Jewel ceased operations at Grove Mall, vacated the premises and moved across the street to the newer Elk Crossing Mall, yet continued to renew its lease at the Grove Mall, thereby tying up the anchor tenant space and preventing another grocery store from moving in. Subsequently, Jewel attempted to sublet to United Skates for the "obnoxious" use of operating a roller rink with arcade games.

The plaintiff bears the ultimate burden of proving that there was in fact such a conspiracy. *Market Force v. Wauwatosa Realty,* 906 F.2d 1167, 1170 (7th Cir. 1990) (citing *Monsanto v. Spray-Rite Serv.,* 465 U.S. 752, 763 (1984)). However, a conspiracy to engage in anti-competitive conduct "need not, and generally will not, be established by direct evidence." *Contractor Utility Sales v. Certain-teed Products,* 638 F.2d 1061, 1074 (7th Cir. 1981). Rather, "[t]he requisite concerted action may be inferred from . . . circumstantial evidence." *Id.* Following the holdings of the Supreme Court in *Matsushita Elec. Indus v. Zenith Radio,* 475 U.S. 574 (1986), and *Monsanto* regarding the sufficiency of the standard of proof in a Section 1 claim, the Seventh Circuit has adopted a three-step inquiry. The court first reviews the plaintiff's evidence of a conspiracy. The court then considers whether the plaintiff's evidence of conspiracy is ambiguous; that is, is it as consistent with the defendants' permissible, legitimate independent business

interests as with an illegal conspiracy? If the defendants can show a plausible and justifiable reason for their conduct that is consistent with proper business practice, the burden then shifts to the plaintiff to come forward with direct or circumstantial evidence that tends to exclude the possibility that defendants were pursuing these independent interests. *Market Force,* 906 F.2d at 1170-71. If the plaintiff cannot do so, a grant of summary judgment for the defendant is appropriate. *Id.*

In *Monsanto,* a price-fixing case, the Supreme Court applied this standard, and concluded that there was a triable issue of fact regarding the existence of a conspiracy. The evidence in that case included direct evidence of agreements to maintain prices, such as testimony from a district manager that defendant Monsanto approached price-cutting distributors and warned them that if they did not maintain the suggested resale price, they would not receive adequate supplies of a certain product. When one of the distributors did not agree, Monsanto complained to the distributor's parent company, and the parent company instructed its subsidiary to comply; the distributor then informed Monsanto that it would charge the suggested price. The Court found this evidence "plainly . . . persuasive as to a meeting of minds." *Monsanto,* 465 U.S. at 765. In *Market Force,* by contrast, the Seventh Circuit noted that evidence of informal communications and meetings among defendants, and of similarity in policies, for example, would not be considered unambiguous support for a inference of conspiracy. *Market Force,* 906 F.2d at 1172-73.

We apply the analytical framework of *Monsanto* and *Matsushita,* as set forth in *Market Force,* to the facts of the present case. Plaintiffs' prima facie evidence of Jewel's involvement in the averred conspiracy is the fact that Jewel

benefitted greatly from the slow but steady demise of the Grove Mall and the resulting increase in consumer traffic at the Elk Crossing Mall. Therefore, plaintiffs argue, Jewel had a compelling motive to participate in a conspiracy. When considering whether a genuine issue for trial exists on a claim of antitrust conspiracy, the Supreme Court views evidence of motive to conspire, or lack thereof, as "highly relevant." *Matsushita*, 475 U.S. at 595-97. "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 596-97.

Defendants argue that Jewel's purported actions in furtherance of the alleged conspiracy were entirely consistent with Jewel's permissible independent business interests. Jewel maintains that it moved to the Elk Crossing Mall in order to take advantage of the newer, larger, and overall more attractive facilities and open a companion Osco drugstore (which was prohibited under its lease at the Grove Mall). Jewel further maintains that it attempted to sublet to United Skates simply to fulfill its legitimate business interest in earning some rent on the property. Similarly, Jewel's departure from the Grove Mall to serve as the anchor tenant at Elk Crossing also served the legitimate business interests of Jewel's alleged co-conspirators, the Elk Crossing defendants. However, what Jewel has failed to satisfactorily explain to the court is its legitimate interest in continuing to pay rent on a vacant store and its refusal to cancel the lease or accept Serfecz's offer to pay the rent Jewel would have received from United Skates. Certainly, the rational trier of fact might conclude that Jewel's motive in refusing was purely anticompetitive.

However, plaintiffs are not yet over the hurdle in terms of meeting their burden of proof of conspiracy under Section 1 of the Sherman Act. A "fundamental prerequisite" of a Section 1 violation "is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied." *Contractor Utility Sales*, 638 F.2d at 1074. Thus, evidence that two defendants each benefitted from anticompetitive practices does not itself establish an unlawful conspiracy; evidence of an agreement is critical. *Id.* at 1075. "Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather . . . there must be evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anti-competitive purpose." *Id.* at 1074.

It is on this issue that plaintiffs' response to the defendants' summary judgment motion is notably silent. Certainly, there is evidence that both Jewel and the Elk Crossing defendants reaped the benefits of the demise of the Grove Mall. But on the issue of conspiracy, plaintiffs offer only speculation, hunch, and theory.[8] For example, as evidence of the Elk Crossing defendants' participation in the purported anticompetitive scheme, plaintiff emphasizes that the Elk Crossing defendants planned from the start to duplicate the tenant mix of the Grove Mall. Plaintiffs maintain that "[n]o rational real estate developer would *duplicate* the tenant mix of a mall directly across the street unless he knew the existing mall was going to be devalued and

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8. We note also that what few arguments plaintiffs do advance regarding the existence of a conspiracy concern only Jewel and the Elk Crossing defendants and United Skates; no attempt has been made by plaintiffs to suggest that their claim of a Section 1 violation might be based on a conspiracy between Jewel and its sister company, American Stores. In fact, as discussed earlier, *supra* note 6, very little at all has been said by either party about American Stores. Thus, we do not address whether evidence of such a conspiracy would constitute a proper basis for a Section 1 claim.

prohibited from competing and obtaining new tenants," Plaintiffs' Response at 16, and ask us to infer from the duplication a conspiracy to devalue the Grove Mall. In support of their theory, plaintiffs cite the opinion of their shopping center expert that "the way the center was planned clearly showed a 'very strong, very confident pattern of activity that showed [defendants] had no fear of competition coming from the old center.' " Plaintiff's Response at 16 (citing Leonard Deposition at 114). The persuasiveness of this opinion is doubtful, given the commonplace appearance of look-alike strip-malls on opposite corners of busy intersections throughout the suburbs. Be that as it may, the fact that the Elk Crossing defendants may have been fairly confident that they would be able to successfully compete with the dilapidated mall across the street is not itself sufficient evidence of a conspiracy between Jewel and American Stores and these defendants. Plaintiffs emphasize also the close business tie between a grocery anchor tenant and the shopping center location it occupies, characterizing Jewel as a "partner in interest" with the owners and developers of the Elk Crossing Mall. While it is true that the business interests of the anchor tenant and the interests of the landlord shopping mall may be aligned, this "confluence of interest," to quote plaintiffs, is not, alone, sufficient evidence to support an inference of participation in an illegal antitrust conspiracy.

In the absence of evidence of an agreement between Jewel and American Stores and their co-defendants to destroy competition, we must grant the motion for summary judgment as to plaintiffs' claims of Sherman Act Section 1 violations in Count I.[9]

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9. Plaintiffs complain repeatedly of delays in production of various discovery materials and their inability to take the deposition of defendant

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For similar reasons, we must also grant defendants' motion for summary judgment on plaintiffs' claims in Count II of monopolization in violation of Section 2 of the Sherman Antitrust Act. Section 2 of the Sherman Act, unlike Section 1, does not require proof of a conspiracy between two or more parties; rather, the focus of this section is on the actions of a single firm to control a market. 15 U.S.C. § 2; *Okansen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992). However, because of our findings in Part I of this opinion, *supra* pp. 22-24, regarding standing, evidence of a conspiracy between defendants Jewel and American Stores and the Elk Crossing defendants would be required. We found that plaintiffs had standing to challenge Jewel's actions only in relation to the retail shopping center market, not the grocery market. Obviously, Jewel and American Stores could not, by themselves, illegally monopolize the market for retail shopping centers. They could, however, be found liable for Section 2 violations by virtue of a conspiracy between themselves and players in the retail shopping center market, the Elk Crossing defendants. Because the plaintiffs have not presented sufficient evidence to raise a genuine issue of concerted action between the

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Patrick F. Daly, real estate developer and president of the beneficial owner of the Elk Crossing Mall. Yet, it was upon plaintiffs' own motion that the court agreed to consider this motion on an expedited basis. *See* Order of June 29, 1994. Thus, it would be difficult for plaintiffs now to argue that the matter was not yet ripe for summary judgment due to incomplete discovery. However, we can make no definitive assessment regarding the status of discovery because on October 20, 1993, we referred all discovery disputes to the designated Magistrate-Judge. If, after additional discovery, plaintiffs are able to present evidence in support of their conspiracy claim, and can demonstrate why this evidence was not available earlier, we would be willing to entertain a motion to reconsider.

two sets of defendants, we must grant summary judgment for Jewel and American on Count II as well.

III. The Breach of Lease Claim

In Count IV of their complaint, plaintiffs claim that Jewel's actions in keeping its space at the Grove Mall dark and vacant in furtherance of its alleged antitrust goals constitutes a breach of requirements in its lease that the premises be used only to operate a grocery store and only for lawful purposes.

A. Unlawful Use

The first sentence of Paragraph 1 of Jewel's lease ("sentence 1") provides:

> Lessee shall not use the demised premises for any unlawful purpose nor shall it commit waste.

and the second sentence ("sentence 2") provides:

> It shall comply with all lawful requirements of the local Board of Health, Police and Fire Departments, and state and federal authorities, respecting the manner in which it uses the leased premises.

Defendants' Memoranda, Exhibit 4 ("Lease"). Plaintiffs maintain that Jewel's use of the premises to restrain trade and to monopolize the grocery store business violates Sections 1 and 2 of the Sherman Act, and thus constitutes an unlawful use of the premises in violation of sentence 1 of paragraph 1 of the lease.

Appendix B

Because we have found in Part II of this opinion that plaintiffs have not met their burden of proof of conspiracy and, thus, have not established a Section 1 violation, Section 1 cannot serve as a basis for plaintiffs' breach of lease claim. As regards the alleged Section 2 violation, we found that plaintiff had standing to challenge Jewel only in relation to the retail shopping center market, not the grocery market, and that Jewel could be found liable for monopolistic conduct in this market only on a theory of conspiracy. Again, because there was insufficient evidence of a conspiracy, we granted summary judgment as to Section 2 as well. However, Section 2, unlike Section 1, does not itself require proof of a conspiracy. Thus, plaintiffs' lack of standing under the Clayton Act to sue Jewel for monopolizing the grocery market does not mean that a violation of Section 2 of the Sherman Act has not occurred; it means only that plaintiffs are not the appropriate parties to bring a civil action for antitrust remedies on the basis of such a violation. Nor does plaintiffs' lack of antitrust standing mean that they lack standing as parties to the lease to sue for breach of a lease provision relating to violations of the law, arguably including violations of Sherman Antitrust Act Section 2.[10] But because of their position that plaintiffs lack

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10. Defendants might argue that because plaintiffs lack standing to sue for the underlying antitrust violations, plaintiffs also lack standing to sue for breach of the unlawful use covenant based on these antitrust violations. However, plaintiffs' standing as lessors to sue on the lease is independent of the question of standing to sue on the underlying violations. For example, even though a lessor lacks standing to prosecute his tenant for operation of a drug dealership or gambling ring on the leased premises under the criminal code, he could sue for breach of an unlawful use covenant in the lease. Indeed, defendants appear to concede that plaintiffs have standing to bring exactly this type of suit. Defendants' Memorandum at 23. Applying similar reasoning, we believe plaintiffs have standing to sue for breach of the lease based on their tenant's alleged illegal antitrust behavior.

standing to bring an *antitrust* suit on this basis, defendants have not even addressed the question of whether there is sufficient evidence that Jewel illegally monopolized the grocery market in violation of Section 2. For purposes of considering defendants' motion regarding the breach of lease claim, and in the absence of contrary arguments by defendants, we assume that there is sufficient evidence of monopolistic conduct in the grocery market by Jewel in violation of Section 2.

We must next consider whether this type of illegal act was the type of act contemplated by the language of the lease prohibiting the use of the premises for unlawful purposes. Neither party has offered much case law to guide our interpretation of this language. The only relevant case cited is *Deutsch v. Phillips Petroleum Co.*, 128 Cal. Rptr. 497, 498 (Cal. App. 2d Dist. 1976). In *Deutsch*, the Court of Appeals of California interpreted a lease provision somewhat similar to sentence 2 of paragraph 1 of the Jewel lease, and concluded that the alleged antitrust violations did not constitute a breach of the lease. However, the California court's analysis rested primarily on language which is not present in the provision of the Jewel lease regarding unlawful use. The *Deutsch* lease stated that the lessee "shall conduct its business on the said demised premises in conformity with all State or Federal Statutes and Municipal Ordinances applicable thereto . . . ." *Id.* at 499. The California court made much of the concluding words "applicable thereto," which it found to modify the word "premises." Based on this wording, the *Deutsch* court concluded that a breach of this provision of the lease could result only from a violation of a statute directly "applicable to the premises," and that the antitrust violation in question did not meet this requirement because it had no significant relation to the premises. *Id.* at 500-501. The court further noted that the purpose of such a provision

was to "ensure[] that the lessee will harm neither the physical attributes nor the reputation of the property." *Id.* at 501.

The Jewel lease, unlike the lease described in *Deutsch*, has two separate sentences dealing with use of the premises, the first restricting unlawful use and the second dealing with compliance with various laws relating to the premises. It is sentence 2 which corresponds to the lease provision at issue in *Deutsch*. However, plaintiffs' claim of breach of lease is based primarily on sentence 1's prohibition of unlawful use, and not sentence 2's requirement of compliance with the requirements of various governmental authorities. Thus, the *Deutsch* holding is on point here only insofar as sentence 1 of the Jewel lease is similar in language and purpose to sentence 2 and the analogous *Deutsch* provision. There is no reason to believe that sentence 1 of the Jewel lease is merely an introduction to or duplication of sentence 2; more likely, it has a separate and somewhat different focus from sentence 2. Otherwise, its presence in paragraph 1 would be redundant and somewhat meaningless. Moreover, by contrast to the disputed provision in the *Deutsch* lease, sentence 1 of the Jewel lease is a general provision prohibiting the use of the premises "for any unlawful purpose." Sentence 1 of the Jewel lease has no clause restricting its application to laws "applicable to the premises," and thus, we believe that breaches of this provision, unlike the *Deutsch* provision, need not necessarily involve violations of laws directly related to the premises. We find that sentence 1 is not analogous to the provision at issue in the *Deutsch* lease, and accordingly, we decline to follow the ruling in *Deutsch*.

In a further attempt to escape the application of sentence 1, defendants argue that this provision relates to the use of the premises only for such activities as prostitution, drug-dealing, or

gambling. While it is true that these activities might be more traditionally and typically characterized as "criminal" or "illegal," as compared to antitrust conduct, defendants have offered no evidence to support their narrow interpretation of "unlawful purpose."

In light of the unambiguous,[11] broad and non-restrictive wording of sentence 1, we conclude that use of the leased premises in furtherance of a Section 2 antitrust violation could indeed constitute a breach of the lease. Thus, we deny the motion for summary judgment on the claim of breach of lease in Count IV insofar as it is based on the illegal use provision of the lease.

B. Continuous Operation

Plaintiffs also argue that by acting to keep the premises vacant, Jewel has breached paragraph 28 of the lease, which provides that "Lessee shall use the leased premises only for the operation of a grocery supermarket." Plaintiffs contend that the requirement in paragraph 28 that the premises be used "only for the operation of a grocery" implies that the premises must be occupied and used, as opposed to left dark and vacant. In other words, plaintiffs infer into paragraph 28 a continuous use requirement although one is not expressly provided.

However, not only does paragraph 28 not expressly require continuous use, but elsewhere, the lease actually anticipates a situation of extended vacancy and contains express provisions to

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11. If there were any ambiguity, we would follow the general rule of contract interpretation which requires courts to construe an ambiguity against the drafter. However, there is no evidence as to which party drafted the lease at issue in this case.

address just these circumstances. In paragraph 17, the lease provides that in addition to a minimum base rental, "lessee covenants to pay as percentage rental an amount equal to one per cent (1%) of all sales in excess of four million four hundred forty thousand and no/100 — Dollars . . . made in or from the leased premises per lease per year." Paragraph 17 further states that "[t]he obligation to pay percentage rental shall not be deemed to require Lessee to conduct business on the leased premises nor to operate its business so as to produce percentage rental."

Also directly relevant is paragraph 30, which provides that "[i]n the event that the Lessee allows the leased premises to remain vacant or fails to open for business for a period of sixty (60) consecutive days or more during the term, Lessee shall for the purpose of calculating the percentage rental be deemed during each week that it is not open for business . . . to have made sales in an amount equal to the amount of the average sales per week made during the three (3) years prior to such time."

Because paragraphs 17 and 30 explicitly and specifically address the situation of extended vacancy and inoperation, these two paragraphs override any suggestion that a continuous use requirement might be inferred from the "use for operation as a grocery" provision in paragraph 28. Thus, it is clear from the express language of the lease that Jewel's behavior regarding its leased premises at the Grove Mall is well within its rights under the lease.

Plaintiffs cannot avoid this harsh result by resort to the covenant of good faith and fair dealing. A covenant to deal fairly and in good faith is implied in every contract in Illinois, *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992) (citing *Martindell v. Lake Shore Nat'l Bank*, 154 N.E.2d 683

(1958)), including property leases. *See, e.g., Abbott v. Amoco Oil,* 619 N.E.2d 789, 798 (Ill. App. 2nd Dist. 1993), *appeal denied,* 624 N.E.2d 804 (1993); *P.M.C. v. Ekstein,* No. 91 C 3709, 1992 U.S. Dist. Lexis 7306, *6 (N.D. Ill. May 13, 1992). However, the implied covenant of good faith and fair dealing is not an independent source of duties for either party to a contract. *Beraha,* 956 F.2d at 1443. Rather, it is an interpretive rule of construction, which " 'comes into play in defining and modifying duties which grow out of specific contract terms and obligations.' " *Id.* (citing *Gordon v. Matthew Bender & Co.,* 562 F. Supp. 1286, 1289 (N.D. Ill. 1983)). The covenant, then, is merely "an estimate of 'what parties would agree to if they dickered about the subject explicitly.' " *Continental Bank, N.A. v. Everett,* 964 F.2d 701, 705 (7th Cir. 1992) (quoting *Jordan v. Duff & Phelps,* 815 F.2d 429, 435-36 (7th Cir. 1987)), *cert. denied,* 113 S.Ct. 816 (1992). The covenant is thus used to fill contractual gaps. Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing. *Continental,* 964 F.2d at 705. Unfortunately for plaintiffs, this is just such a situation. The express language of paragraphs 17 and 30 leaves no room for the implied covenant of good faith and fair dealing to step in. Serfecz has inherited a highly unfavorable lease, and we cannot rewrite the contract now.

Defendants' motion for summary judgment on the claim of breach of lease in Count IV must be granted insofar as it is based on Jewel's failure to continue operating or release its space at the Grove Mall.

Appendix B

IV. The Malicious Prosecution Claim

In February 1990, Serfecz learned that Jewel was in the process of negotiating a sublease with United Skates. To prevent the proposed sublease, Serfecz changed the locks to the facility. Jewel then brought a declaratory judgment action against Serfecz in state court regarding its right to sublease its premises to United Skates. Plaintiffs maintain that the lawsuit was devised solely for the purpose of harassing and intimidating Serfecz and his attorneys, and otherwise interfering with Serfecz's efforts to redevelop the Grove Mall. Accordingly, in Count III of their complaint, plaintiffs charge Jewel with malicious prosecution.

"Actions for malicious prosecution of a civil proceeding are not favored in Illinois on the ground that courts should be open to litigants for resolution of their rights without fear of prosection for calling upon the courts to determine their rights." *Keefe v. Aluminum Co. of America*, 519 N.E.2d 955, 956 (Ill. App. 1st Dist. 1988), *appeal denied*, 526 N.E.2d 831 (1988). A malicious prosecution claimant must prove the following five elements:

(1) Institution and prosecution of judicial proceedings by the defendant;

(2) Lack of probable cause for those proceedings;

(3) Malice in instituting the proceedings;

(4) Termination of the prior cause in plaintiff's favor; and

(5) Suffering by plaintiff of some special injury, beyond the anxiety, loss of time, attorney fees and necessity for

> defending one's reputation which are the common incidents of most lawsuits.

Id.

There is no question in the present case as to proof of elements (1) and (4), regarding institution and prosecution of judicial proceedings and termination of the suit in plaintiffs' favor. Additionally, we find that plaintiffs have sufficient evidence to create a factual dispute as to the third element, malicious intent, especially given the requirement that on summary judgment the court must view all inferences in the light most favorable to the nonmoving party. *See Regner v. City of Chicago*, 789 F.2d at 536. In support of their interpretation of events, plaintiffs point to Jewel's misconduct during discovery in the state court suit, implying that Jewel's dilatory discovery tactics were intended primarily to exacerbate the harassment suffered by plaintiffs as a result of the litigation. Plaintiffs also note that prior to trial in the state court action, Jewel rejected Serfecz's offer to pay Jewel the same rent it would have received from United Skates, a decision by Jewel which further implies that Jewel's true goal in bringing suit was not to sublet to United Skates and earn rental income but to harass Serfecz. Paragraph 31 of the Jewel lease states that "[n]o sublease shall be made . . . which increases the insurance rates with respect to the leased premises without Lessor's written consent." A major focus of the lawsuit concerned the impact that the subtenancy of a roller rink and games arcade would have had on the Grove Mall's property insurance rates. Plaintiffs point to evidence that despite the importance of the insurance issue, Jewel's primary witness had no idea what the effect on insurance rates would be. This ignorance on Jewel's part suggests a lack of preparation and investigation. Plaintiffs also note that Jewel waived its right to

use an insurance expert. This evidence further supports plaintiffs' position that the lawsuit was merely a "sham" brought primarily for purposes of harassment and intimidation.

Probable cause in the context of a malicious prosecution claim means the existence of facts "that would lead a person of ordinary caution and prudence to believe that he had a justifiable claim." *Keefe*, 519 N.E.2d at 956. We find that plaintiffs have sufficient evidence to support a finding of lack of probable cause, the second element of malicious prosecution. At trial, the state court directed a finding for Serfecz, concluding that Jewel had presented no evidence to support its case. Plaintiffs' Response, Exhibits (*Jewel v. Serfecz*, No. 90 CH 7124, (Circuit Court of Cook County 7/13/90)). The appellate court affirmed the trial court, noting that Jewel has presented "no competent testimony" regarding the insurance rates. Plaintiffs' Response, Exhibit 5 (*Jewel v. Serfecz*, No. 1-90-2576, (Ill. App. 1st Dist. May 31, 1991). We agree with plaintiff that the fact that Jewel did not thoroughly research or present evidence on the insurance question supports an inference that it lacked probable cause to believe that it would win the case.

Defendants note that Jewel succeeded in its quest for a temporary restraining order ("TRO") against plaintiffs, and argue that as a matter of law, this preliminary success conclusively establishes probable cause. In *Keefe*, the court held that a civil judgment entered by the circuit court would constitute conclusive evidence of probable cause, even though that judgment was subsequently reversed on appeal. 519 N.E.2d at 956. The Illinois Appellate Court said nothing, however, about the evidentiary impact of the issuance of a TRO. While obviously a grant of a TRO would be some evidence of probable cause, we do not believe it to have the same *per se* conclusive weight as a

final judgment by the trial court, presumably reached after a period of more careful and thorough consideration of all the issues than is typical at the TRO stage of litigation. Moreover, defendants have not presented much information regarding the nature of the TRO that was issued. We know only that Serfecz attempted to oust Jewel from the premises by changing the locks, and that as a result of the TRO, Jewel regained control of the property it leased in the Grove Mall. The mere fact that the trial court concluded that Jewel was entitled to access to its leased property does not conclusively establish that Jewel had probable cause to believe that it was entitled to a declaratory judgment regarding its right to sublet to United Skates. Thus, we conclude that there remains a material factual dispute on the issue of probable cause.

Finally, we consider the element of special injury. Defendants argue that plaintiffs have failed to present evidence of some unique injury, such as seizure of property or personal arrest, that differs from the usual stresses and demands inherent in defending a law suit. The Illinois Appellate Court explained in *Equity Assoc. v. Village of Northbrook*, 524 N.E.2d 1119 (Ill. App. 1st Dist. 1988), *appeal denied*, 530 N.E.2d 243 (1988), that special injury involves interference with property so great as to "suspend" the victim's "right to the free use of his own property . . . during the pendency" of the prosecution. *Id.* at 1123 (citing *Lasswell v. Ehrlich*, 416 N.E.2d 423 (1981) (citing *Norin v. Scheldt Manufacturing*, 130 N.E. 791 (1921))). The result is either an actual seizure or an effective or constructive seizure of the property, far beyond mere "interference." *Equity Assoc.*, 524 N.E.2d at 1123. Unless a plaintiff can prove such special injury, "the institution of an ordinary civil action or proceeding, no matter how unfounded, vexatious or malicious it may be, does not give rise to an action for malicious prosecution." *Bank of*

Lyons v. Schultz, 399 N.E.2d 1286, 1288 (1980) (internal quotation marks and citation omitted). Plaintiffs' argument regarding injury focuses on the harm Serfecz suffered in his efforts to redevelop the Grove Mall as a result of the litigation. However severe this injury may have been, it is simply not the type of "special injury" envisioned by the Illinois courts.[12]

Thus, we must grant defendants' motion for summary judgment on the claim of malicious prosecution in Count III for failure to prove special injury.

CONCLUSION

For the reasons discussed above, the motion of defendants Jewel and American Stores for summary judgment on the antitrust and malicious prosecution claims in Counts I, II, and III is granted. Summary judgment is also granted on Count IV insofar as the breach of lease claim is based on Jewel's failure to continue operating a grocery store at the Grove Mall, and denied insofar as it is based on the unlawful use provision in the lease. The only claim remaining against Jewel and American Stores, then, is the state law claim in Count IV for breach of lease based on Jewel's alleged use of the premises in furtherance of a monopolistic scheme in violation of Sherman Antitrust Act § 2. We have supplemental jurisdiction over this claim pursuant to 28

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12. We note that a preliminary injunction which prevents a plaintiff from using his property would constitute a special injury under Illinois law. *Bank of Lyons*, 399 N.E.2d at 1288-89. However, the temporary restraining order issued in this case does not constitute such an injury. While the state court ultimately concluded that Jewel was not entitled to sublet to United Skates, there is no indication that plaintiffs were injured by the TRO which, apparently, merely gave their legal tenant, Jewel, access to and control of its leased premises.

Appendix B

U.S.C. § 1367(a). *Timm v. Mead Corp.*, Slip Op. No. 93-3629 at 7 (7th Cir. Aug. 9, 1994).[13]

DATED: August 30, 1994

ENTER: s/ John F. Grady
John F. Grady, United States District Judge

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13. Even were we to dismiss all the federal claims against the other defendants, we would decline to exercise our discretion under § 1367(c) to dismiss the remaining pendent state law claims, but rather, weighing concerns of judicial economy, fairness and comity, we would continue to exercise supplemental jurisdiction. This case is well over a year old, and, like the court in *Timm*, we see "no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the . . . state law issues anew in state court," *id.* at 8-9, especially given the fact that the remaining state law breach of lease claim involves a claim of violations of federal antitrust law.